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CRAWFORD REALTY AND DEVELOPMENT
CORPORATION,

Appellee,

v.

WOODLAW TRUST AND SAVINGS BANK,
as Trustee, etc., et al.,
Appellees,

and

W. F. GILLINGER, et al.,
Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

314 I.A. 188

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action filed by the plaintiff corporation November 12, 1935, to quiet the title to certain tracts of vacant real estate described in the complaint, there was service by publication, default of defendants and a decree for plaintiff on June 2, 1936. Gallinger, Plaisier, and others, filed petitions praying the decree might be set aside. The petitions were filed under §50 () of the Civil Practice Act (Smith Hurd's Anno. Stat. Chap. 110, par. 174, p. 404). Plaintiff answered the petitions, the cause was referred to a master who took the evidence and reported, recommending the decree of June 2, 1936, stand and the petitions dismissed for want of equity. Exceptions were overruled, a decree as recommended entered July 16, 1938, and petitioners appeal.

The facts reported by the master are that the Kaspar American State Bank, as trustee, was vested with the legal title of these premises and held the same under a declaration of trust for the use and benefit of Charles C. Cross, Joseph A. Hinkamp, Edgar R. Redlich and J. Hinkamp. The declaration of trust provided that the interest of any beneficiary should consist solely of a power of direction to deal with the title through a committee of three members or through Robert P. Webb; also the right to receive the proceeds from the rentals or sales made of any part of the premises, all of which should be deemed personal property.

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and

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In an action filed by the plaintiff corporation on November 19, 1912, to quiet title to certain lots of land in the city of Chicago, Illinois, the defendant corporation was named. The complaint set forth that the plaintiff corporation was the owner of certain lots of land in the city of Chicago, Illinois, and that the defendant corporation was claiming title to the same. The complaint also set forth that the plaintiff corporation was entitled to the possession of the land and that the defendant corporation was not entitled to the same. The complaint was filed in the Circuit Court of Cook County, Illinois, and the case was assigned to the Honorable Judge Charles E. Hughes for trial. The trial took place on December 10, 1912, and the jury returned a verdict in favor of the plaintiff corporation. The court entered judgment in accordance with the verdict of the jury. The defendant corporation has appealed from the judgment of the court. The case is now pending in the Illinois Appellate Court.

Joseph A. Hinkamp, Redlich and Cross incorporated Hinkamp & Company, each of these three holding one-third of its capital stock. The Kasper Bank sold the premises to other banks which took title as trustee in each case. Robert P. Webb, at first a salesman for Hinkamp & Company, later became one of the beneficiaries and the vice president, treasurer, and a director of Hinkamp & Company. Hinkamp & Company was agent to sell. In order to sell business lots in these subdivisions the beneficiaries organized what were known as Hinkamp Syndicates. A trust agreement was prepared for each syndicate which designated the proper bank as trustee, fixed the unitization of each syndicate and divided its units into \$500 each. Hinkamp & Company sold shares in these syndicates to approximately 644 persons and issued to them certificates showing their interest in the premises. Each certificate recited the name of the holder, the amount of shares or units purchased, the sum of money paid on account, etc. This plan was often used during the boom days to dispose of real estate. The certificates, however, while they described real estate, provided that the holder of the certificate should have an interest only in the proceeds of the sale of the premises and not any interest in the land therein described. Then came the depression. The certificate holders defaulted on payments they had agreed to make and vendee banks who had purchased or contracted to purchase the lands from the Kaspar American State Bank also defaulted in the payment of obligations under their contracts. The dissatisfied holders recorded certain certificates and the purpose of this suit is to have their apparent interest removed as clouds upon the title of plaintiff, who through mesne conveyances has become the owner in fee simple of these tracts of land. As already stated the decree is in favor of the plaintiff.

Joseph, William, Alfred and John, the sons of the late Joseph Company, each of these three holding an equal share of the stock. The father had sold the stock to the sons, and each son took title as trustee in each case. Robert, John, and Alfred a sale was for William a company, but a company, and a director or officer and the vice president, treasurer, and a director of Hinkamp & Company. Hinkamp & Company was agent for the order to sell business lots in these subdivisions the beneficial title organized what were known as Hinkamp Syndicates. The agreement was prepared for each syndicate which included the proper bank as trustee, fixed the unitization of each syndicate and divided its units into 500 each. Hinkamp & Company sold shares in these syndicates to approximately 500 persons and issued to them certificates showing their interest in the syndicates. Each certificate recited the name of the holder, the amount of shares or units purchased, the cost of money paid, and account, etc. This plan was often used during the boom years of disposal of real estate. The certificates, however, which were described real estate, provided that the holder of the certificate should have an interest only in the proceeds of the sale of the premises and not any interest in the land therein described. Then came the depression. The certificate holder, relying on payments they had agreed to make and vendors would not and was charged or contracted to purchase the lands from the vendors. The State Bank also defaulted in the payment of obligations under their contracts. The dissatisfied holders recorded their certificates and the purpose of this suit is to have their certificates and interest removed as clouds upon the title of plaintiffs, through means conveyances has become the owner in fee simple of these tracts of land. As already stated the record in this case of the plaintiffs.

It is contended for reversal that the court erred in entering a final decree. It is said that the hearing provided for by §50 (8) of the Civil Practice Act is not a final hearing on the merits but only a preliminary hearing on the petitioner's right to answer, and in support of this contention the defendants cite Bruner v. Battell, 83 Ill. 317, 323; Philip Gollner Co. v. Gillette, 216 Ill. App. 25; Sullivan v. Sullivan, 275 Ill. App. 597; First Cong. Church v. Page, 257 Ill. 472, 476, and Correll v. Grieder, 245 Ill. 378, 381.

The record shows that this point was raised upon the hearing before the master; that the master ruled that under the pleadings the hearing was on the merits and advised the point be presented to the court before hearing testimony on the merits. The defendants presented a petition to the chancellor who indicated he would accept the view of the master, whereupon defendants withdrew their petition to have the hearing limited to the preliminary question and the parties proceeded to offer evidence on the merits. Irrespective of the construction which might be put upon §50 (8), we hold that by so proceeding the petitioners acquiesced in the ruling of the master and chancellor and cannot now, in view of this voluminous record, be heard contend that the court had only power to settle the preliminary question.

Defendant also contends that the complaint was multifarious and that the defects in process were such that jurisdiction of the court over defendants was not acquired. For the same reason (namely that they proceeded to hear the cause on its merits) they cannot now be heard to urge this contention.

It is urged that the Kaspar American State Bank was without authority under its contracts to declare a forfeiture because these contracts contained no provision that time should be of the essence thereof, and in support of this contention

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The record shows that this point was raised at the hearing before the master; that the master ruled that the defendant's testimony was on the merits and denied the point. The defendant presented a petition to the chancellor who indicated he would accept the view of the master, whereupon defendant withdrew their petition to have the hearing limited to the preliminary question and the parties proceeded to offer evidence on the merits. In respect of the constitutionality point raised but upon 250 (8), we hold that by so proceeding the petition was acquiesced in the ruling of the master and chancellor and cannot now, in view of this voluminous record, be heard contrary to the court had only power to settle the preliminary question.

Defendant also contends that the complaint is null and void for lack of jurisdiction and that the defects in process were such that jurisdiction of the court over defendants was not acquired. For the same reason (namely that they proceeded to rent the house on the merits) they cannot now be heard to make this contention. It is urged that the Negro American Law Center, Inc., without authority under its contracts to declare a forfeiture because these contracts contained no provision that time should be of the essence thereof, and in support of this contention

Clark v. Lyons, 25 Ill. 105, is cited. The case is not at all controlling. The question there involved was one of whether a mere delay in payment would justify a forfeiture. The Supreme Court held it did not. In this case it is not a question of delay but rather a question of whether these purchasers shall be allowed to hold their interest without paying at all. They do not ask time to pay; they do not offer to pay at any time whatsoever. As a matter of fact, they wish to rescind their purchases on the ground of fraud and at the same time keep whatever interest they purchased. This, of course, they cannot do. The master found, as a matter of fact, that there was no fraud or misrepresentation in the sale to these defendants of their syndicate certificates, and it is argued by the plaintiff that, as a matter of fact, there was no fraud. Their contention is based on the fact undenied that there was at this time a great rise in the value of real estate and that any of the representations which may have been made to purchasers were justified. An examination of the evidence leads us to grave doubt on this proposition. However that may have been, the evidence shows that these defendants at no time took the position that they had been defrauded up to the time their petitions were filed in the trial court. The plaintiff points out that nothing is better established in the law than that he who seeks to rescind for fraud must not speculate upon a possible profit, notwithstanding the fraud, but must act promptly to enforce his rights upon learning of it. Day v. Fort Scott Investment Co., 153 Ill. 293, 304; Greenwood v. Fenn, 136 Ill. 146, 158; Kanter v. Ksander, 344 Ill. 408, 415, are cited.

The solicitors in this case were familiar with all the facts and both of them testified. The testimony of defendants' solicitor is to the effect that the subscribers did not continue

Clark v. Lyons, 22 Ill. 108, 11 cited. The question then involved was one of whether a mere delay in payment would justify a tort claim. The Supreme Court held it did not. In this case it is not a question of delay but rather a question of whether there was an immediate injury. They be allowed to hold their interest without paying at all. They do not ask time to pay; they do not offer to pay at any time whatsoever. As a matter of fact, they wish to receive their purchases on the ground of time and the same time keep what ever interest they purchased. This, of course, they cannot do. The master found, as a matter of fact, that there was no fraud or misrepresentation in the sale to these defendants of their syndicate certificates, and it is argued by the plaintiff that as a matter of fact, there was no fraud. Their contention is based on the fact undenied that there was at this time a great rise in the value of real estate and that any of the representations which may have been made to purchasers were justified. An examination of the evidence leads me to grave doubt on this proposition. However that may have been, the evidence shows that these defendants at no time took the position that they had been defrauded up to the time their actions were filed in the trial court. The plaintiff admits that nothing is better established in the law than that he who seeks to rescind for fraud must not speculate upon a possible profit, notwithstanding the fraud, but must act promptly to enforce his rights upon learning of it. Way v. Fort Scott Investment Co., 153 Ill. 403, 304; Greenwood v. Penn, 102 Ill. 143, 153; Kanawha v. Kanawha, 344 Ill. 403, 413, are cited.

The solicitors in this case were familiar with all the facts and both of them testified. The testimony of defendants' solicitor is to the effect that the subscription will not continue

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their payments because of the depression and because they didn't have the money. They made no claim that they had been defrauded or that the property was overpriced or that they did not get what was sold to them. Defendants cite a number of cases but all are clearly distinguishable.

The decree will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

their payments because of the depreciation of the dollar. They didn't have the money. They were as of 1933 they had been detained on that the property was overvalued. That was the not get what was sold to them. Detention of a number of cases but all are clearly distinguished. The doctor will be efficient.

REPLYING

McNulty, J. J., and O'Donnell, J. J., counsel.

41251

OSCAR P. RUBARDT,
Appellant,

v.

MARIE RUBARDT SALZMAN and HAROLD L.
SALZMAN,
Appellees

—
MARIE RUBARDT SALZMAN,
Appellee,

v.

OSCAR P. RUBARDT,
Appellant.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

314 I.A. 189'

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

November 30, 1937, Oscar P. Rubardt filed his complaint in equity against his daughter, Marie Rubardt Salzman, and her husband, Harold L. Salzman. The bill prayed for the return of property taken, an injunction against further transfer, that alleged articles of co-partnership should be declared void, an accounting taken and other relief.

An injunction issued December 3 against defendants and their attorney, Al Martin Curtis. The Salzmanns answered denying the equity of the complaint and filed a counterclaim attaching a copy of the alleged articles of co-partnership. The counterclaim prayed the partnership might be held valid and dissolved for the fault of O. P. Rubardt, a receiver appointed, and an accounting taken.

The complaint, the answer and the counterclaim were verified. February 7, 1938, the cause was referred to a master to report "relating only to the existence of a co-partnership". The master reported there was a partnership, under (Smith-Hurd's Anno. Stat., Chap. 106 1/2, §7, p. 721). The court overruled exceptions and entered an order approving the report and rereferring the cause to state the account. The master filed his

OSCAR P. RUBENST
Appellant,

v.

MARIE RUBENST SALZMAN and HAROLD I.
SALZMAN,

Appellees

MARIE RUBENST SALZMAN,
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OSCAR P. RUBENST,
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An injunction issued December 3 against defendants and their attorney, Al Martin Curtis. The Salzman answered denying the equity of the complaint and filed a counterclaim attacking a copy of the alleged articles of co-partnership. The counterclaim prayed the partnership might be held valid and dissolved for the fault of O. P. Rubenst, a receiver appointed, and an accounting taken.

The complaint, the answer and the counterclaim were verified. February 7, 1938, the case was referred to a master to report "relating only to the existence of a co-partnership". The master reported there was a partnership, minor (with-Marie's Anno. Stat., Chap. 106 1/2, p. 731). The court overruled exceptions and entered an order approving the report and referring the case to state the account. The master filed his report.

second report with extended findings of fact and law. Plaintiff's exceptions were overruled and a final decree entered February 23, 1940.

The decree finds that Oscar P. Rubardt entered into a partnership with his daughter, Marie Rubardt Salzman, on May 1, 1933 under the name of O. P. Rubardt & Co.; that it was an equal partnership as to assets and profits; that Oscar P. Rubardt wrongfully caused the dissolution of it; that certain valuable trademarks registered in the name of Oscar P. Rubardt and never assigned by him were a part of the partnership assets; that the real estate on which the business is conducted, title to which is in the name of Oscar P. Rubardt, is also a part of the partnership assets; that Oscar P. Rubardt caused the dissolution of the co-partnership wrongfully and that, therefore, in computing the value of his interest the good will of the business should not be considered; that it is just and equitable that the possession and management of the property and business of O. P. Rubardt & Company should be forthwith delivered and surrendered to the defendant and counterclaimant, Marie Rubardt Salzman under (Smith-Hurd Anno. Stat., Chap. 106 1/2, §38, pp. 760-761).

Plaintiff argues the findings of the master and the decree are against the manifest weight of the evidence. After careful consideration of, the reports of the master, the findings of the decrees, hearing the oral argument of counsel, and not unmindful of the weight to be given to findings of fact by a master when approved by the chancellor, we are persuaded the contention must be sustained.

Plaintiff at the time of the hearing was 72 years of age. He was born in Denmark, came to this country when 23 years of age and worked as an interior decorator. Later he became an importer of dyes. During the First World War it became impossible

second report with a finding of no fault. The exceptions were overruled and a bill of exceptions was filed, 1940.

The decree finds that Oscar, who was not in the partnership with his brother, never admitted to the partnership under the name of Oscar, and that the partnership as to assets was limited; that Oscar's withdrawal from the partnership caused the dissolution of it; that Oscar's withdrawal from the partnership in the name of Oscar, and not as a partner, was assigned by him as part of the partnership assets; that the real estate on which the business is conducted, being in the name of Oscar, is also a part of the partnership assets; that Oscar's withdrawal caused the dissolution of the co-partnership wholly and that, therefore, in computing the value of his interest the good will of the business should not be considered; that it is just and equitable that the portion and management of the property and business of Oscar, Rubert & Company should be forthwith delivered and transferred to the defendant and counterclaimant, Oscar Rubert & Company (Smith-Kurd Anno. Est., Chap. 103 1/2, 250, p. 750-751).

Plaintiff argues the validity of the estate and the decree are against the manifest weight of the evidence. After careful consideration of the reports of the master, the findings of the decedent, hearing the oral argument of counsel, and not unwilling of the right to be given to findings of fact by a master when supported by the Chancellor, we are persuaded that contention must be sustained.

Plaintiff at the time of the hearing was 25 years of age. He was born in Denmark, came to this country when 25 years of age and worked as an interior decorator. Later he became an importer of dyes. During the first world war it became impossible

to import. In 1916 he began to manufacture dyes. He specialized in two colors, ecru and cream. He added other formulas. At first he carried on the business in his garage. He was sole owner. He did the work and kept the books. The business prospered. It was moved to 5116 North Ravenswood Avenue into a building owned by him. He registered in his name trade-marks for his products which were known as "Pro Dura Tint and Dye Tablets".

In 1893 he married Marie Rubardt. They had three daughters, Thyra, who married Mr. Jensen, Ethel, who became Mrs. Ulrey, and Marie, who on October 26, 1934, was married to Dr. Harold L. Salzman, a dentist, co-defendant. Mrs. Marie Rubardt obtained a divorce from her husband in 1923 on the ground of cruelty. They were remarried in 1932. After this litigation was begun she sued for separate maintenance.

In 1927 Mr. Rubardt became ill and arrangements were made with the two daughters, Ethel and Marie, who were then in California with their mother, to come to Chicago and work in his business. They came and entered on the work with skill and energy. Mr. Rubardt was absent much of the time. In his absence he trusted everything to Marie. She took care of the books, drew checks, and purchased securities for her father. Her sister, Thyra, lived at Eau Claire, Wisconsin, with her husband, Arthur Jensen. Ethel and Marie at first were paid about \$25 each per week. This compensation from time to time was increased. Rubardt went to Denmark almost every year. He owned a home in Florida and usually was there from November to April or May. The business prospered. The books show that the net profit before making provisions for depreciation and adjustments for inventory variation, for these years were: 1930, \$31,349.80; 1931, \$33,759.03; 1932, \$36,308.59; 1933, \$36,376.34; 1934, \$36,997.04; 1935,

for his products which were known as "Keweenaw" and "Keweenaw"
 building owned by him. He resided in his home at
 pered. It was moved to 3115 North Avenue in 1910.
 owner. He did the work and kept the house. The building was
 first he worked on the building for the year 1910
 in two colors, red and green. The building was
 to import. In 1910 he began to import goods from the United States

beginning the first for separate maintenance.

cruelty. They were remarried in 1932. About this time they also obtained a divorce from her husband in 1932 on the ground of Harold L. Ullrey, a dentist, co-defendant. Mrs. Ullrey and her daughter, Ullrey, who married Mr. Jensen, and her daughter, Ullrey, who married Mr. Jensen, and her daughter, Ullrey, who married Mr. Jensen.

In 1935 he married Marie Johnson. They had a son.

In 1927 Mr. Rupert became ill and arrangements were made with the two daughters, Ethel and Marie, who were then in California with their mother, to come to Chicago to work in the business. They came and entered on the work with Ethel as clerk, Mr. Rupert was absent much of the time. In the summer he received everything to Marie. The bulk of the books, given books, and purchased quantities for the year were given to Marie. Ethel and Marie at first were paid \$10.00 each per month, lived at Ken Osline, Incorporated, with their mother, and then went to Denmark almost every year. This compensation from time to time was increased. Marie went to Denmark almost every year. She had a home in Florida and usually was there from November to April or May. The business prospered. The books and that the net profits before making provisions for depreciation and maintenance for inventory variation for these years were: 1930, \$1,412.50; 1931, \$1,450.00; 1932, \$1,500.00; 1933, \$1,550.00; 1934, \$1,600.00; 1935, \$1,650.00; 1936, \$1,700.00; 1937, \$1,750.00; 1938, \$1,800.00; 1939, \$1,850.00; 1940, \$1,900.00; 1941, \$1,950.00; 1942, \$2,000.00; 1943, \$2,050.00; 1944, \$2,100.00; 1945, \$2,150.00; 1946, \$2,200.00; 1947, \$2,250.00; 1948, \$2,300.00; 1949, \$2,350.00; 1950, \$2,400.00; 1951, \$2,450.00; 1952, \$2,500.00; 1953, \$2,550.00; 1954, \$2,600.00; 1955, \$2,650.00; 1956, \$2,700.00; 1957, \$2,750.00; 1958, \$2,800.00; 1959, \$2,850.00; 1960, \$2,900.00; 1961, \$2,950.00; 1962, \$3,000.00; 1963, \$3,050.00; 1964, \$3,100.00; 1965, \$3,150.00; 1966, \$3,200.00; 1967, \$3,250.00; 1968, \$3,300.00; 1969, \$3,350.00; 1970, \$3,400.00; 1971, \$3,450.00; 1972, \$3,500.00; 1973, \$3,550.00; 1974, \$3,600.00; 1975, \$3,650.00; 1976, \$3,700.00; 1977, \$3,750.00; 1978, \$3,800.00; 1979, \$3,850.00; 1980, \$3,900.00; 1981, \$3,950.00; 1982, \$4,000.00; 1983, \$4,050.00; 1984, \$4,100.00; 1985, \$4,150.00; 1986, \$4,200.00; 1987, \$4,250.00; 1988, \$4,300.00; 1989, \$4,350.00; 1990, \$4,400.00; 1991, \$4,450.00; 1992, \$4,500.00; 1993, \$4,550.00; 1994, \$4,600.00; 1995, \$4,650.00; 1996, \$4,700.00; 1997, \$4,750.00; 1998, \$4,800.00; 1999, \$4,850.00; 2000, \$4,900.00; 2001, \$4,950.00; 2002, \$5,000.00; 2003, \$5,050.00; 2004, \$5,100.00; 2005, \$5,150.00; 2006, \$5,200.00; 2007, \$5,250.00; 2008, \$5,300.00; 2009, \$5,350.00; 2010, \$5,400.00; 2011, \$5,450.00; 2012, \$5,500.00; 2013, \$5,550.00; 2014, \$5,600.00; 2015, \$5,650.00; 2016, \$5,700.00; 2017, \$5,750.00; 2018, \$5,800.00; 2019, \$5,850.00; 2020, \$5,900.00; 2021, \$5,950.00; 2022, \$6,000.00; 2023, \$6,050.00; 2024, \$6,100.00; 2025, \$6,150.00; 2026, \$6,200.00; 2027, \$6,250.00; 2028, \$6,300.00; 2029, \$6,350.00; 2030, \$6,400.00; 2031, \$6,450.00; 2032, \$6,500.00; 2033, \$6,550.00; 2034, \$6,600.00; 2035, \$6,650.00; 2036, \$6,700.00; 2037, \$6,750.00; 2038, \$6,800.00; 2039, \$6,850.00; 2040, \$6,900.00; 2041, \$6,950.00; 2042, \$7,000.00; 2043, \$7,050.00; 2044, \$7,100.00; 2045, \$7,150.00; 2046, \$7,200.00; 2047, \$7,250.00; 2048, \$7,300.00; 2049, \$7,350.00; 2050, \$7,400.00; 2051, \$7,450.00; 2052, \$7,500.00; 2053, \$7,550.00; 2054, \$7,600.00; 2055, \$7,650.00; 2056, \$7,700.00; 2057, \$7,750.00; 2058, \$7,800.00; 2059, \$7,850.00; 2060, \$7,900.00; 2061, \$7,950.00; 2062, \$8,000.00; 2063, \$8,050.00; 2064, \$8,100.00; 2065, \$8,150.00; 2066, \$8,200.00; 2067, \$8,250.00; 2068, \$8,300.00; 2069, \$8,350.00; 2070, \$8,400.00; 2071, \$8,450.00; 2072, \$8,500.00; 2073, \$8,550.00; 2074, \$8,600.00; 2075, \$8,650.00; 2076, \$8,700.00; 2077, \$8,750.00; 2078, \$8,800.00; 2079, \$8,850.00; 2080, \$8,900.00; 2081, \$8,950.00; 2082, \$9,000.00; 2083, \$9,050.00; 2084, \$9,100.00; 2085, \$9,150.00; 2086, \$9,200.00; 2087, \$9,250.00; 2088, \$9,300.00; 2089, \$9,350.00; 2090, \$9,400.00; 2091, \$9,450.00; 2092, \$9,500.00; 2093, \$9,550.00; 2094, \$9,600.00; 2095, \$9,650.00; 2096, \$9,700.00; 2097, \$9,750.00; 2098, \$9,800.00; 2099, \$9,850.00; 2100, \$9,900.00; 2101, \$9,950.00; 2102, \$10,000.00; 2103, \$10,050.00; 2104, \$10,100.00; 2105, \$10,150.00; 2106, \$10,200.00; 2107, \$10,250.00; 2108, \$10,300.00; 2109, \$10,350.00; 2110, \$10,400.00; 2111, \$10,450.00; 2112, \$10,500.00; 2113, \$10,550.00; 2114, \$10,600.00; 2115, \$10,650.00; 2116, \$10,700.00; 2117, \$10,750.00; 2118, \$10,800.00; 2119, \$10,850.00; 2120, \$10,900.00; 2121, \$10,950.00; 2122, \$11,000.00; 2123, \$11,050.00; 2124, \$11,100.00; 2125, \$11,150.00; 2126, \$11,200.00; 2127, \$11,250.00; 2128, \$11,300.00; 2129, \$11,350.00; 2130, \$11,400.00; 2131, \$11,450.00; 2132, \$11,500.00; 2133, \$11,550.00; 2134, \$11,600.00; 2135, \$11,650.00; 2136, \$11,700.00; 2137, \$11,750.00; 2138, \$11,800.00; 2139, \$11,850.00; 2140, \$11,900.00; 2141, \$11,950.00; 2142, \$12,000.00; 2143, \$12,050.00; 2144, \$12,100.00; 2145, \$12,150.00; 2146, \$12,200.00; 2147, \$12,250.00; 2148, \$12,300.00; 2149, \$12,350.00; 2150, \$12,400.00; 2151, \$12,450.00; 2152, \$12,500.00; 2153, \$12,550.00; 2154, \$12,600.00; 2155, \$12,650.00; 2156, \$12,700.00; 2157, \$12,750.00; 2158, \$12,800.00; 2159, \$12,850.00; 2160, \$12,900.00; 2161, \$12,950.00; 2162, \$13,000.00; 2163, \$13,050.00; 2164, \$13,100.00; 2165, \$13,150.00; 2166, \$13,200.00; 2167, \$13,250.00; 2168, \$13,300.00; 2169, \$1

\$40,191.92; 1936, \$50,287.84; 1937, \$45,502.72; 1938 (for 6 months) \$25,784.59.

The daughter, Ethel, married Mr. Ulrey. A son was born. There was a divorce, and Mr. Rubardt made provision for the family. Marie Rubardt was 23 years of age when she began to work for her father. He came to have complete confidence in her. In 1933, the father, mother and Marie made a trip together to Europe at his expense. Marie was often with them at the Florida and Wisconsin homes.

The pleadings of Mrs. Salzman aver that prior to May 1, 1933, the business was conducted largely as a family enterprise under an oral agreement. Whether there was an agreement, it is a fact that Mr. Rubardt paid considerable amounts for the support, maintenance and pleasure of his own and the families of his daughters. If there was any intention May 1, 1933, to supersede this agreement with another, there is no evidence tending to show consultation with other members of the family with reference thereto.

The principal controversy is whether a partnership in fact existed. Defendants rely much on the writing dated May 1, 1933. The evidence shows this writing was prepared by Leo Kradin, a "tax counsellor". Mr. Kradin testified on the first reference; he was not called on the second. His testimony is that he met plaintiff in an auto repair shop where they were introduced by a Mr. Norgaard. Kradin says that Norgaard recommended him to Mr. Rubardt as an expert in tax problems. Later Kradin was called in by Marie Rubardt (now Mrs. Salzman) to make out the income tax returns. Kradin prepared the returns from 1930 up to and including 1936. Mr. Kradin says Mr. Rubardt talked with him in April, 1933, and later came to his office with Marie. Kradin says Mr. Rubardt asked him about a partnership. Kradin told him

\$40,101.32; 1936, \$50,877.84; 1937, \$45,302.11; 1938, for 2

months) \$55,704.50.

The daughter, Ethel, married Mr. Wiley. A son was born. There was a divorce, and Mr. Hubert made provision for the family. Marie Hubert was 12 years of age when she began to work for her father. He came to have complete confidence in her. In 1933, the father, mother and Marie made a trip together to Europe at his expense. Marie was often with them at the Florida and Wisconsin homes.

The pleadings of Mrs. Salzman aver that prior to May 1, 1938, the business was conducted largely as a family enterprise under an oral agreement. Whether there was an agreement, it is a fact that Mr. Hubert paid considerable amounts for the support, maintenance and pleasure of his own and the families of his daughters. If there was any intention May 1, 1937, to supersede this agreement with another, there is no evidence tending to show consultation with other members of the family with reference thereto.

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there would be many advantages. Kradin also says he told Rubardt the only change needed would be in the investment account; that there should be one for Rubardt, another for Marie. Rubardt then asked him to draw an agreement, saying it was merely a family affair that would not require a lawyer. Kradin says he next saw Rubardt and Marie at the office of O. P. Rubardt & Company. Kradin got a printed form of agreement for partnership, took it to the office May 1, 1933, and asked Marie to fill it out with the typewriter. She did this, her father listening while he (Kradin) dictated. He swears positively Marie and Mr. Rubardt signed the writing there at that time. The agreement was made and a carbon. Kradin took the original and filed it for record. He afterwards picked it up at the recorder's office and mailed it to the office of O. P. Rubardt & Company. The cross mark in front of Marie's signature is not explained.

Rubardt denies the instrument was executed at the time or in the manner Kradin recites. He admits his signature is genuine. He denies he signed the writing at that time or with any intention to create a partnership. He says he was away from home much of the time, was in ill health and often signed papers submitted to him by his daughter without examination. The inference is that his signature was obtained surreptitiously.

Marie (Mrs. Salzman) says the agreement was executed May 1, 1933, in the office, then at 2847 McLean Avenue. In general, she corroborates the testimony of Kradin. She says her father had prior to this time talked with her about a partnership and said she was entitled to be a partner because of the help she had been to the business. More than three years afterwards, Mrs. Salzman says, while in Florida in 1936, she obtained her father's signature to a card for the bank account at the First National Bank. The card is in evidence. The word "partners" is

there would be no evidence. In the investigation conducted by the only change needed would be in the investment account; that there should be one for "Krahn, John P. & Co., Inc." and that Krahn asked him to draw an instrument, which it was finally finally drawn. Krahn said that he did not receive the instrument. Krahn and Marie at the office of J. P. Hubardt & Company. Krahn got a printed form of agreement for partnership, and he took it to the office May 1, 1935, and asked Marie to fill it out and the typewriter. She did this, but Krahn is denying while he (Krahn) dictated. He swore positively that the instrument was signed the writing there at that time. The agreement was made and a carbon. Krahn took the original and filed it for record. He afterwards picked it up at the recorder's office and mailed it to the office of J. P. Hubardt & Company. The cross mark in front of Marie's signature is not explained. Hubardt denies the instrument was executed at the time or in the manner Krahn recited. He admits his signature is genuine. He denies he signed the writing at that time or with any intention to create a partnership. He says he was with Marie some much of the time, was in all her office and often signed papers submitted to him by his daughter without examination. The instrument in that his signature was obtained surreptitiously. Marie (Mrs. Salzman) says the agreement was executed May 1, 1935, in the office, when at 2347 Kohn Avenue. In evidence, she corroborates the testimony of Krahn. She says her father had prior to this time talked with her about a partnership and said she was entitled to be a partner because of the help she had been to the business. More than three years afterwards, Mrs. Salzman says, while in Florida in 1938, she obtained her father's signature to a card for the bank account at the First National Bank. The card is in evidence. The word "partnership" is

written on it in the handwriting of Rubardt. He admits his signature but says he does not remember when he signed it. Mrs. Salzman kept the books and with Kradin prepared and filed the income tax returns. Kradin made entries which it is now argued show a partnership set up. The date of entry is indefinite - "May, 1933". It is on page 23 of the cash journal. It shows an investment credit of \$16,762.59 each for Marie Rubardt and O. P. Rubardt. These amounts represented the net worth of the business as shown by the books December 31, 1932. The figures are purely arbitrary in so far as the supposed partnership set up is concerned. There was no computation of profits from December 31, 1932, to May 1, 1933, the date of the agreement. The figures, as Mrs. Salzman admits, included much personal property of Mr. Rubardt's. As a matter of fact, May 1, 1933, did not mark any actual change in the way the business was conducted. Mrs. Salzman continued her services as formerly and drew her weekly salary as usual. Rubardt continued to withdraw cash from the business as theretofore. In the year 1934 he withdrew in cash \$43,363.11.

An accountant hired by Mrs. Salzman afterwards undertook to allocate the income of the business to Mrs. Salzman and her father one-half to each. There are no entries on the books made in the usual course of business justifying such allocation. Entries made later by the accountant are purely arbitrary and for the purposes of the suit. Mrs. Salzman continued to keep the books. There are no entries by her allocating profits of 1933 as between herself and her father. There was no conveyance of the premises on which the business was conducted to the supposed partnership nor conveyances to it of any of the assets personally owned by Rubardt. There is no proof of notice to customers or the public, no change in the books or method of

customers or the public, no change in the focus or method of

doing business, except as stated.

The writing provides the father and daughter are to become co-partners under the name of O. P. Rubardt & Company, to begin the 1st day of May, 1933, and continue for 25 years, or until terminated by mutual consent on 60 days' notice. Each party is to contribute \$10,000. Each may withdraw not more than \$50 per week for personal expenses to be deducted from profits, if there are profits, otherwise from the investment. In case of dissolution the invested capital is to be determined by replacement value, the party remaining to have the right to remunerate the withdrawing party by paying 50% cash and 50% in twelve equal monthly installments.

Neither of the parties made any contribution of \$10,000, although Mrs. Salzman's accountant credits her with \$10,000 and charges her with a loan from her father of the same amount. There was a credit to each of an investment of \$16,762.50, based on the net worth of the business December 31, 1932. There are no entries in the usual course of business showing such transaction. March 15, 1934, Mrs. Salzman filed her personal income return for the year 1933. In it she states under oath that her occupation is "office clerk" and that her income for the year was \$1,560. She and Kradin also made and filed on that date income return for O. P. Rubardt for 1933. This return states that he is the sole proprietor of O. P. Rubardt & Company. February 4, 1936, Mrs. Salzman made a return to the Census Bureau in which it was stated the name of the business was O. P. Rubardt & Company; that the name of the owner was O. P. Rubardt, and that there was only one proprietor. The return was under oath. The income tax return for the business for the year 1934 was prepared by Mrs. Salzman and Kradin and filed March 15, 1935. This return said the business was a co-partnership organized January 1, 1934,

and that Marie Salzman and O. P. Rubardt each had a half interest in the net income and computed the income tax on that basis. Mr. Rubardt was out of the state at the times these returns were made and did not have any direct part in making them.

The first entry in the books indicating a withdrawal from the business by Mrs. Salzman for herself other than her weekly wages was made by her in the cash journal on April 28, 1936. On that date she charged herself with \$27,044.31, and drew out the same amount for her father. A few days afterwards she used this to purchase in her own name \$53,000 par value United States bonds at the price of \$54,088.26. She rented safety deposit box No. 44238 in her own name at the First National Bank and deposited these bonds in it. The bonds remained there until July 28, 1937, when she rented box No. 7729 at the First National Bank and placed the bonds in it. She gave her husband, Harold L. Salzman, power of attorney to enter this box. The United States government made a deficiency tax assessment against the business of \$38,757, covering the years from December 31, 1928, to December 31, 1937. The assessment shows fraud penalties for the calendar years 1930 to 1935 in the sum of \$9,415.51. As a matter of fact, Mrs. Salzman admits that in keeping the books the expense accounts were padded for the purpose of reducing the net income and thus the income tax. She charges she was coerced by her father to do this. She says he even threatened to have her prosecuted in order to compel obedience to his unlawful demands. He denies all this. He was not in Chicago when these returns were made and filed. Mrs. Salzman had a tax expert on whom she would naturally rely. Mr. Rubardt may have approved; he did not coerce Mrs. Salzman with reference to the income returns.

It is not certain just when Mrs. Salzman decided to

claim she was a half owner of the business. April 28, 1936, was the date upon which she withdrew money from the business and purchased \$53,000 in United States bonds in her own name and put these bonds with \$15,000 others owned by Mr. Rubardt in her own box. Dr. Salzman, her husband, knew of this transaction. It is perfectly clear Rubardt did not know. She did not inform him, although on less important matters she wrote with particularity about the business, as indicated by her letter of May 6, 1937, addressed to "Dear Papa", expressing much concern for his health and ending, "Love and Kisses, Marie".

The first break between Mrs. Salzman and her father arose about a real estate broker named Kester. Mr. Rubardt met him through Mr. Ulrey. Mr. Rubardt desired to purchase a \$50,000 mortgage for his three daughters and negotiated for it through Kester. He paid Kester \$5,000 as a down payment. Kester used the money for his own purposes and did not buy the mortgage. He finally admitted this to Mr. Rubardt and promised restitution. Mr. Rubardt talked with Mrs. Salzman and told her Kester was a crook. She resented this. About this time her whole attitude toward her father changed. When he asked questions she did not seem to wish to answer. He became suspicious. He went to his safety deposit box at the First National Bank and found it had been put in the name of Mrs. Salzman and that he could not have access. He telephoned her and requested her to meet him at the bank, which she did the following day and gave him access to box No. 7728. Mr. Rubardt took out the contents of the box, wrapped the securities in a paper, which he took to the office. He counted the cash. He made a list of the securities. He rewrapped all in the paper, handed it to Mrs. Salzman and told her to place the package back in the box. She did so. This would have been a good time to tell him of box No. 7729, in which was \$68,000 in

claim and a bill of exchange, dated 1937, for the sum of \$25,000. The date upon which the bill was drawn was 1937, and it was purchased for \$25,000 in United States bonds. But these bonds with \$15,000 of the proceeds were given to the owner of the box, Mr. Salzman, who was known to the owner. It is perfectly clear that the bill was not known to the owner, although on these important matters the owner was very mysterious about the business, as indicated by the letter of May 8, 1937, addressed to "Dear Papa", expressing much concern for his health and ending, "Love and kisses, Papa".

The first break between Mrs. Salzman and her father arose about a real estate broker named Kester, who, through Mr. Ulfrey, Mr. Hubbard desired to purchase a \$25,000 mortgage for his three daughters and negotiated for it a loan. Kester, he paid Kester \$5,000 as a down payment. Kester used the money for his own purposes and did not pay the mortgage. He finally admitted this to Mr. Hubbard and promised restitution. Mr. Hubbard talked with Mrs. Salzman and told her Kester was a crook. She resented this. About this time her role attitude toward her father changed. When he asked questions she did not seem to wish to answer. He became suspicious. He went to his safety deposit box at the First National Bank and found it had been put in the name of Mrs. Salzman and that he could not have access. He telephoned her and requested her to meet him at the bank, which she did the following day and gave him access to box No. 7738. Mr. Hubbard took out the contents of the box, wrapped the securities in a paper, which he took to the office. He counted the cash. He made a list of the securities. He rewrapped all in the paper, handed it to Mrs. Salzman and told her to place the package back in the box. She did so. This would have been a good time to tell him of box No. 7738, in which was \$25,000.

securities belonging to Mr. Rubardt, \$15,000 of which had been purchased by him long prior to May 1, 1933. She did not avail herself of the opportunity.

After the remarriage of Rubardt to his divorced wife and up to the time of this difference the record indicates the mother, daughters and their three families were happy together. The evidence shows Mr. Rubardt was generous to them. The mortgage he negotiated to purchase through Kester for the daughters is only one of many instances. He seems to have been extraordinarily fond of Mrs. Salzman. Mr. Rubardt supported Ethel's family after she was divorced from her husband. In May, 1936, he presented his daughter, Mrs. Jensen, with twenty-one one hundred dollar bills. Her husband, Arthur Jensen, who testified for defendants, gives a picture of family felicity as it existed prior to 1937. In the fall of that year Mr. Rubardt told him he had a lot on his mind. Jensen says that this was the matter about Mr. Kester; that Mr. Rubardt said the sad part of the whole story was that his daughter seemed to be taking the side of Kester. As a matter of fact, it is hard to understand why the family took the part of Kester. He seems to have confessed his misappropriation of \$5,000 of Rubardt's money as the family knew.

Matters came to a climax at the office on October 11, 1937. The facts are narrated by Mrs. Salzman, Mr. Rubardt and Margaret Connolly (an employee), who were the only persons present. Mrs. Salzman came to the office about 11 o'clock in the morning. Mr. Rubardt asked her some questions. She made no answer. He asked her if he was not worthy of an answer, then talked about Kester. Rubardt said Kester was a crook. Mrs. Salzman, he says, said Kester was an honest man. Mrs. Salzman says she told her father, "He is not a crook and you should remember no man is a crook until he is proven a crook, and I heard him say he would

accusation belonging to the...
purchased by him long...
himself on the opportunity.

After the... of... in...

and up to the... of this... and...

mother, daughter and their... family...

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his daughter, Mrs. Jensen, who... one...

Wife. Her husband, Arthur Jensen, who...
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crook until he is proven a crook, and I heard him say he...

give you that money back". She went into the laboratory. She says Mr. Rubardt followed her and said he wanted to dissolve the partnership. She also says he said, "I am going to clean everything out of the bank and I am going to clean everything out of the vault and I want you to give me the keys that belong here". She says she went into the larger office. He followed and grabbed the keys away from her. She tried to get a ring which belonged to her, and he put her aside. She says he struck her. He finally handed the ring to her. She says, "I opened the key ring, took off the key he wanted and handed it to him. I asked him if he were trying to crush me. He said, 'I am going to crush you again and again and again, and I want you to get out of here and stay out. If you don't get out, I will throw you out'."

Mr. Rubardt denies he struck her or used any such language and is corroborated by Margaret Connolly. Miss Connolly says Mrs. Salzman cried out, "Call the police". All agree that Mr. Rubardt went home and that Mrs. Salzman stayed. She was apparently excited. She and Miss Connolly took a drink of whiskey together, and for some time she talked bitterly about her father to Miss Connolly. Mr. Rubardt says Mrs. Salzman's last words to him at the office were, "You can't fire me"; that he replied, "What do you mean?"; that she said, "You will find out". If she made this last statement she spoke truly. When she left the office she went to the bank. Her attorney, Mr. Curtis, was with her. She took the contents of box No. 7728, more than \$4,000 in cash, \$96,000 in Treasury Notes and other securities. She also took from box No. 7729 the \$53,000 in United States Treasury Notes which she had purchased with funds taken from the business April 28, 1936, and \$15,000 of government bonds Mr. Rubardt owned prior to May 1, 1933. On October 13, she drew and cashed a check for \$20,000 on the bank account to her own order, practically ex-

hausting it. Prior to this time she had taken the ledger journal and the cash book to her apartment at the Edgewater Beach Hotel. She says her father told her to destroy them. He denies he did so. She had also taken the cancelled checks and books of check stubs. It is apparent Rubardt knew nothing about the securities that were in box No. 7729. His first knowledge of the appropriation of these securities came from his attorneys to whom an attorney for Mrs. Salzman, gave information that Mrs. Salzman had taken them.

Plaintiff filed suit November 30, 1937. His complaint describes carefully the securities, etc., of which he had made a list. None in box No. 7729 was included. Defendants' attorneys were before Judge Feinberg at the hearing on the injunction. They told the judge that plaintiff's attorneys had been given a complete list of securities taken. The list did not include this \$68,000 of securities in box No. 7729, and Mr. Curtis says he did not know about the taking of these at that time. Mrs. Salzman did not disclose these in her sworn pleadings. They are not included in the injunction. It is apparent Mr. Rubardt's first knowledge of this box No. 7729 and its contents was secured from defendants' attorney in February, 1938.

The decree is based upon the theory, first, that Mrs. Salzman was an equal partner in the business with her father; second, that Mr. Rubardt wrongfully excluded her from the business; and, third, that she was wholly without fault. In our opinion the evidence will not sustain any one of these theories.

In the first place, it appears the supposed partnership was created for the sole purpose of reducing the income tax the business would be required to pay. There was no intention to create a partnership with a view to sharing profits equally. This appears from the undisputed facts that the author of the

haunting it. Prior to this time she had taken the "New York Journal" and the cash book to her apartment at the New York Hotel. She says her father told her to destroy them. He denied he did so. She had also taken the cancelled checks and books of check stubs. It is apparent Hubardt knew nothing about the securities that were in box No. 7728. His first and last of the securities of these securities came from his attorney to whom an attorney for Mrs. Salzman, gave information that Mrs. Salzman had taken them.

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writing was a tax expert, that no partnership books were kept nor partnership profits distributed. This also is made clear by Mrs. Salzman's own income tax return for the year 1933 (made March 15, 1934) and from her report to the Census Bureau under oath. Every circumstance in the case indicates that the partnership was fictitious. We think it also apparent that both the supposed partners knew this to be true. At least they acted as if they did. We hold there was no partnership within the meaning of Section 7 of the Uniform Partnership Act.

In the second place, assuming the existence of such a partnership, the evidence is wholly insufficient to show Mrs. Salzman was wrongfully excluded from the business. The finding of the master and the decree on this point rests wholly on the uncorroborated testimony of Mrs. Salzman, which is denied by Mr. Rubardt and negatived by the testimony of Margaret Connolly. The finding is also against inferences to be drawn from every circumstance in the case. Mrs. Salzman admits that on October 11 Mr. Rubardt went home, leaving her in possession of the premises. It is apparent she went to the office on that day in a frame of mind seeking an altercation with her father. Why else her inexcusable defense of Kester, her cry for the police, her swift movement to the deposit boxes in company of her attorney? The facts here do not justify a finding that she was excluded from the business. As a matter of fact, she excluded herself.

The key plaintiff took from his daughter on October 11 was not the door key but a key to a filing cabinet. It is true he changed the locks on the doors but not for several weeks and only after he had learned the manner in which the Salzmanns had wrongfully taken possession of his property and their attempts to wreck his business. He remained in possession of the business and managed it until July 21, 1939. During that time it prospered.

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and managed it until July 31, 1935. During that time it prospered.

Profits were at the rate of \$40,000 to \$50,000 per year. Notwithstanding, on July 21, 1939, unwilling apparently to abide the usual process of the courts, an order was secured depriving him of possession and appointing a trustee, directing the trustee to take control of the business "and to pay Oscar P. Rubardt and Marie Salzman each the sum of \$100.00 per week until the further order of the court". The order also directed the payment of \$15,000 to each of them out of the assets of the business.

In the third place (again assuming a partnership, which we hold did not in fact exist) Mrs. Salzman was not without fault. Her raid on the deposit boxes, the bank account, etc. came perilously near to larceny.

Upon the filing of the record in this court the defendants made a motion to dismiss that part of the appeal which asked a reversal of the decree of October 4, 1938. The motion was made on the theory that the decree was final and appealable and that no notice of appeal was given within 90 days thereafter, as required by § 76 of the Civil Practice Act. This motion was reserved to the hearing and is reargued in the briefs. Defendants say the decree of October 4, was final and appealable because it disposed of a distinct, definite and separate branch of the controversy, namely, whether there was a partnership between Mrs. Salzman and her father. Numerous cases are cited. Sebree v. Sebree, 293 Ill. 228; Suffolk v. Leiter, 261 Ill. App. 82; Wyman v. Hageman, 318 Ill. 64, 73. The issue of the partnership was raised in the case not only by plaintiff's complaint and the answer of defendants but also by defendants' counterclaim and the answer of plaintiff to it. It was essential to the case stated in the counterclaim that proof of the existence of a partnership should be made. Generally speaking, a decree is not final unless it terminates the litigation on the merits of the case, so that

Profits were at the rate of 4,000 to 5,000 per year. Notwithstanding, on July 1, 1935, following a check of this the usual process of the courts, an order was entered directing him of possession and appointing a trustee, directing the trustee to take control of the business "and to pay about \$1,000 per month to Harry Belman each the sum of \$10,000 per month until the further order of the court". The order also directed the payment of \$15,000 to each of them out of the assets of the business.

In the third place (again assuming a partnership), which we hold did not in fact exist) Mrs. Belman was not without fault. Her raid on the deposit boxes, the bank account, the same day, obviously went to Harry.

Upon the filing of the record in this case the defendants made a motion to dismiss that part of the complaint which asked a reversal of the decree of October 4, 1934. The motion was denied on the theory that the decree was final and appealable and that no notice of appeal was given within 90 days thereafter, as required by § 78 of the Civil Practice Act. This motion was served to the hearing and is returned in the briefs. Defendants say the decree of October 4, was final and appealable because it disposed of a distinct, definite and separate branch of the controversy, namely, whether there was a partnership between Mrs. Belman and her father. Numerous cases are cited, Wynn v. Wynn, 203 Ill. 282; Belman v. Belman, 203 Ill. 282; Wynn v. Wynn, 203 Ill. 282. The issue of the partnership was raised in the case not only by plaintiff's complaint and the answer of defendants but also by defendants' counterclaim and the answer of plaintiff to it. It was essential to the case stated in the counterclaim that proof of the existence of a partnership should be made. Generally speaking, a decree is not final unless it terminates the litigation on the merits of the case, so that

the court below has only to proceed with the execution of its decree. Where a decree retains jurisdiction of the cause for future determination of substantial matters in controversy, or where the decree fails to fix the principles by which accounts between the parties are to be stated, and further judicial action is necessary, a decree is interlocutory.

The decree of October 4, did not end the case on the merits. There remained for consideration what were the assets of the partnership, whether these included good will and the trademarks and the real estate in which the business had been conducted, and also whether Mr. and Mrs. Salzman were justified in appropriating the cash and securities in the bank and safety deposit boxes. The finding as to the partnership really settled nothing definitely. In Gray v. Ames, 220 Ill. 251, 77 N. E. 219, the Supreme Court said: "A final decree is one which fully decides and disposes of the entire merits of the case."

To the same effect are Chechik v. Koletsky, 305 Ill. 518, 137 N. E. 419; Smith v. Bunge, 358 Ill. 229, 293 N. E. 122; Reichwein v. McCarthy, 300 Ill. App. 237, 20 N. E. 2d 814; Fyffe v. Fyffe, 292 Ill. App. 539, 11 N. E. 2d, 857; Eglin v. Glatz, 287 Ill. App. 44, 4 N. E. 2d, 259; People ex rel. Nelson v. Stony Island State Savings Bank, 355 Ill. 401, 180 N. E. 267; People v. Fisher, 335 Ill. 406, 167 N. E. 59.

The motion will be denied.

The opinion on this appeal has been unusually delayed because it was first assigned to the Second Division, where, after oral argument and at the request of parties, attempts were made at conciliation without avail. The Second Division then requested the appeal be transferred to this court and an order to that effect was entered. It was again argued orally and further briefs submitted. The record is voluminous, consisting of about 3,000

the court below has only to proceed with the execution of its decree. Where a decree retains jurisdiction of the case for future determination of substantial matters in controversy, or where the decree fails to fix the principles by which conduct between the parties are to be guided, and further judicial action is necessary, a decree is interlocutory.

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To the same effect are Gresham v. Kofetsky, 308 Ill. 518, 137 N. E. 419; Smith v. Burns, 328 Ill. 329, 93 N. E. 132; Reifenstein v. McCarthy, 300 Ill. App. 337, 30 N. E. 2d 514; Fyfe v. Fyfe, 323 Ill. App. 535, 11 N. E. 2d 387; Edlin v. Edlin, 327 Ill. App. 44, 4 N. E. 2d 359; People ex rel. Nelson v. Tracy, Island State Savings Bank, 325 Ill. 401, 180 N. E. 367; People v. Fisher, 325 Ill. 406, 167 N. E. 59.

The motion will be denied. The opinion on this appeal has been unusually delayed because it was first assigned to the Second Division, where, after oral argument and at the request of parties, attempts were made at consultation without avail. The Second Division then requested the appeal be transferred to this court and in order to that effect was entered. It was again argued orally and further briefs submitted. The record is voluminous, consisting of about 2,000

pages of testimony with about 500 exhibits.

The controlling facts, as we view them, are, however, few and practically uncontradicted. Rubardt created and developed this business. It is wholly his. Mrs. Salzman made affidavits to that effect several times after May 1, 1933. His family throughout the years have had from it maintenance and support. They have never contributed a penny to it. He may not be without faults, but this record indicates generous treatment of his wife, his children and their families. He came to have supreme confidence in Mrs. Salzman and trusted everything to her. While he was abroad the idea seems to have developed that the fictitious partnership agreement might be used as a basis of depriving him of this business and of his estate. This was begun April 28, 1936, when in his absence Mrs. Salzman placed in the exclusive control of herself and her husband \$58,000 of United States bonds purchased with his money in her own name. Having thus deprived him of his property, she wrote to him at length about his business, addressing him as "Dear Papa", expressing solicitude for his health, and sending him "kisses". Upon his return she picked a quarrel with him, taking the part of a man who had appropriated to his own use money that Mr. Rubardt had entrusted to him. She quarreled about this and made it the occasion for rifling deposit boxes, the bank account, etc. Those who should have restrained her participated in a conspiracy to take away from her father (then 70 years of age) the business which belonged to him. She did not act alone, and those who persuaded and advised her are as much at fault as she.

The decree will be reversed and the cause remanded with directions to dismiss the counterclaim for want of equity, to set aside the order dismissing the complaint, and to take an accounting of the moneys and property these defendants have wrongfully appropriated to their own use.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and O'Connor, J., concur.

REVIEWED AND REMANDRED WITH DISPOSITION.

41251

OSCAR P. RUBARDT,
Appellant,

v.

MARIE RUBARDT SALZMAN and HAROLD L.
SALZMAN,
Appellees.

MARIE RUBARDT SALZMAN,
Appellee,

v.

OSCAR P. RUBARDT,
Appellant.

62
140
APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

314 I.A. 189²

OPINION ON PETITION FOR REHEARING.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendants reargue the case, but we are not convinced. They raise another question, presented for the first time here in their petition and not raised in the trial court. They say if the partnership agreement was executed to reduce the amount of income tax this would constitute a fraud, and that a court of equity will not relieve against it. They cite cases where the courts have refused to set aside deeds made for a fraudulent and illegal purpose. Blake v. Ogden, 223 Ill. 204; Lines v. Willey, 253 Ill. 440 at 451.

There are several answers: first, this question cannot be raised for the first time on appeal; second, while this court pointed out the evidence indicated the purpose of the proposed partnership was to reduce income tax, we did not hold the purpose to be fraudulent or that there was a wrong in that respect in which Marie and her father were pari delicto; third, if we assume the agreement was fraudulent and for a fraudulent purpose, clearly Marie, whose counterclaim is based on it, is the party who is impaled; fourth, the rule called to our attention is based on the equitable maxim that he who comes into equity must come with clean hands. The maxim has its limitations which are applicable

OSCAR E. HUBBARD,
Appellant.

v.

MARIE HUBBARD and
SALMAN,
Appellees.

MARIE HUBBARD and
SALMAN,
Appellees.

v.

OSCAR E. HUBBARD,
Appellant.

OPINION ON PETITION FOR REHEARING.

MR. JUSTICE LATCHETT delivered the opinion of the court.

Defendants herein the case, but are not convinced.

They raise another question, presented for the first time here in their petition and not raised in the trial court. They say

if the partnership agreement was executed to reduce the amount

of income tax this would constitute a fraud, and that a court

of equity will not relieve against it. They also claim that

the courts have refused to set aside deeds made for a fraudulent

and illegal purpose. Blake v. Blake, 111 Cal. 211, 212, 213.

Willey, 288 Ill. 440 at 441.

There are several answers: First, this question cannot

be raised for the first time on appeal; second, while the courts

pointed out the evidence indicated the purpose of the

partnership was to reduce income tax, we did not hold the purpose

to be fraudulent or that there was a wrong in that respect in

which Marie and her father were jointly delinquent; third, if we assume

the agreement was fraudulent and for a fraudulent purpose, clearly

Marie, whose counterclaim is based on it, is the party who is

impaired; fourth, the rule called to our attention is based on

the equitable maxim that he who comes into equity must come with

clean hands. The maxim has its limitations which are applicable

here.

In Pomeroy's Equity Jurisprudence, 4th Ed., Vol. 1, §399, quoted by this court in American University v. Wood, 216 Ill. App. 189, affirmed by the Supreme Court in 294 Ill. 196, it was said:

" * * * It does not extend to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party has no concern. When a court of equity is appealed to for relief it will not go outside of the subject-matter of the controversy, and make its interference to depend upon the character and conduct of the moving party in no way affecting the equitable right which he asserts against the defendant, or the relief which he demands."

The subject matter of this controversy concerns the ownership of this business. Mrs. Salzman's claims are not materially affected by the admitted fact that she padded the payrolls for a fraudulent purpose. Rubardt's title to these assets does not in any way depend upon any wrongful conduct on his part. The property is his because he bought and paid for it and the business is his because he created it by his industry. He has not conveyed to any other. The petition for rehearing will be denied.

PETITION DENIED.

here.

In Bonney's Equity Jurisprudence, 4th Ed., Vol. I, §399, quoted by this court in American University v. 200, 216 Ill. App. 189, affirmed by the Supreme Court in 204 Ill. 188, it was said:

" * * * It does not extend to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party has no concern. When a court of equity is appealed to for relief it will not go outside of the subject-matter of the controversy, and make its interference depend upon the character and conduct of the moving party in no way affecting the equitable right which he asserts against the defendant, or the relief which he demands."

The subject matter of this controversy concerns the

ownership of this business. Mrs. Salzman's claims are not materially affected by the admitted fact that she acted as payee for a fraudulent purpose. Her husband's title to these assets does not in any way depend upon any wrongful conduct on his part. The property is his because he bought the same for it and the business is his because he created it by his industry. He has not conveyed to any other. The petition for rehearing will be denied.

PETITION DENIED.

41820

JAY W. RAPP, Administrator of the
Estate of George Tong, Deceased,
Appellee,

v.

GRACE E. GOERLITZ and CHARLES GOERLITZ,
Defendants.

63
APPEAL FROM

SUPERIOR COURT

COOK COUNTY. 141

On Appeal of CHARLES GOERLITZ,
Appellant.

3141 A. 189³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by Charles Goerlitz from a judgment of \$10,000 entered against him, impleaded with his mother, Grace E. Goerlitz. The action was brought by the administrator, under the statute, for alleged negligence in driving an automobile, said to have been the cause of the death of the intestate. A complaint was filed on November 22, 1940, summons was served and the default of both defendants entered. The cause was submitted to a jury, and on an ex parte trial the verdict was rendered with judgment as heretofore stated.

Our decision in this case is controlled by our opinion in General No. 41939, in which an opinion has been this day filed. More than 30 days after the entry of the judgment in this case, both defendants filed a motion in the nature of a writ of error coram nobis under §72 of the Civil Practice Act. The plaintiff answered, evidence was taken and the court entered an order setting aside the judgment as to Grace E. Goerlitz but denying the motion as to Charles Goerlitz. The appeal in 41939 was by Charles Goerlitz from that order, and this appeal is by Charles Goerlitz from the judgment that was rendered on the verdict of the jury.

Upon the trial of the case it appears that uncontradicted evidence was given to the effect that Charles Goerlitz, at the time of the accident in which deceased was injured, when the suit

JAY W. RAPP, Administrator of the
Estate of George Tonn, deceased,
Appellee.

v.

GRACE E. GOERLITZ and CHARLES GOERLITZ,
Defendants.

On Appeal of CHARLES GOERLITZ,
Appellant.

MR. JUSTICE BRADLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by Charles Goerlitz from a judgment of 10,000 entered against him, imposed with his mother, Grace E. Goerlitz. The action was brought by the administrator, under the statute, for alleged negligence in driving an automobile, said to have been the cause of the death of the intestate. A complaint was filed on November 22, 1940, wherein was set out and the defect of both defendants entered. The cause was submitted to a jury, and on an ex parte trial the verdict was rendered with judgment as heretofore stated.

Our decision in this case is controlled by our opinion in General No. 41938, in which an opinion has been this day filed, more than 30 days after the entry of the judgment in this case, both defendants filed a motion in the nature of a writ of error coram nobis under 925 of the Civil Practice Act. The plaintiff answered, evidence was taken and the court entered an order setting aside the judgment as to Grace E. Goerlitz but denying the motion as to Charles Goerlitz. The appeal in 41938 was by Charles Goerlitz from that order, and this appeal is by Charles Goerlitz from the judgment that was rendered on the verdict of the jury. Upon the trial of the case it appears that uncontested

evidence was given to the effect that Charles Goerlitz, at the time of the accident in which deceased was injured, when the exit

was begun, and at the time of the trial and entry of judgment, was a minor 19 years of age. On the authority of Peak v. Shasted, 21 Ill. 137, and other cases cited in that opinion, it was reversible error for the court to proceed to judgment without appointing a guardian ad litem to defend the minor. For that error the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

was begun, and at the time of the trial and entry of judgment, was a minor 19 years of age. On the authority of Beck v. Chester, 21 Ill. 157, and other cases cited in that opinion, it was reversible error for the court to proceed to judgment without appointing a guardian ad litem to defend the minor. For that error the judgment will be reversed and the cause remanded for another trial.

REVEREND AND HONORABLE

McGuire, P. J., and O'Connor, J., concur.

41842

BERNICE HILGER, as Administratrix of the
Estate of Peter Hilger, Deceased, and
OLLIE DE ANGELO,

Appellees,

v.

PUBLIC SERVICE COMPANY OF NORTHERN
ILLINOIS, a corporation,

Appellant.

ROSE HILGER, as Administratrix of the
Estate of Martin Hilger, Deceased,
Appellee

v.

PUBLIC SERVICE COMPANY OF NORTHERN
ILLINOIS, a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

314 I.A. 190

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

April 3, 1938, Martin Hilger was digging a well on a lot purchased by him in a subdivision just north of Melrose Park in Cook County. The lot fronted on 19th Avenue, was 143.19 feet in depth and on its rear abutted another lot (No. 61) which fronted on 18th Avenue. Peter Hilger and Ollie DeAngelo were helping Martin Hilger dig the well. At the rear of the lots in this subdivision was a 20 foot strip of land dedicated as an easement for public utilities, and in the center of this strip defendant Public Service Company had erected its system for distributing electricity to its customers through transmission lines. In digging the well Peter Hilger used a metal drill or auger about eight inches in diameter and 3 feet long to which, from time to time as the work progressed, were attached pieces of galvanized pipe about 10 feet long. The well was down about 33 feet and the auger with sections of pipe attached to it had become about 33 feet long. This pipe came in contact with defendant's wires. Martin and Peter Hilger were instantly electrocuted. Their widows were appointed to administer their respective estates,

BERNICE HILGER, as Administratrix of the
Estate of Peter Hilger, deceased, and
OLLIE DE ANGIO,
Appellees,

v.

PUBLIC SERVICE COMPANY OF ILLINOIS,
ILLINOIS, a corporation,
Appellant.

ROSE HILGER, as Administratrix of the
Estate of Martin Hilger, deceased,
Appellee

v.

PUBLIC SERVICE COMPANY OF ILLINOIS,
ILLINOIS, a corporation,
Appellant.

MR. JUSTICE BREWER delivered the opinion of the court.

April 6, 1938, Martin Hilger was digging a well on a lot purchased by him in a subdivision just north of Chicago Park in Cook County. The lot fronted on 18th Avenue, was 12.15 feet in depth and on its rear abutted another lot (10.61) which fronted on 18th Avenue. Peter Hilger and Ollie DeAngio were helping Martin Hilger dig the well. At the rear of the lot in this subdivision was a 30 foot strip of land dedicated as an easement for public utilities, and in the center of this strip defendant Public Service Company had erected its system for distributing electricity to its customers through transmission lines. In digging the well Peter Hilger used a steel drill auger about eight inches in diameter and 7 feet long to which from time to time as the work progressed, were attached pieces of galvanized pipe about 10 feet long. The well was dug about 33 feet and the auger with sections of pipe attached to it had become about 33 feet long. This pipe came in contact with defendant's wires. Martin and Peter Hilger were instantly electrocuted. Their wives were appointed to administer their respective estates.

and each brought suit against defendant under the statute. Ollie DeAngelo was severely injured at the same time and also brought suit against defendant, charging negligence. The cases were tried together and verdicts entered in favor of the three plaintiffs. Each of the estates of those who died was allowed \$10,000, and DeAngelo \$400. Judgments were entered in favor of each plaintiff on these separate verdicts. Defendant appeals.

It is contended for reversal that an instruction for defendant requested at the close of all the evidence should in each case have been given; that the persons injured were not in the exercise of due care; that a new trial should have been given because the verdicts were against the manifest weight of the evidence, and because of errors in the ruling of the court on the admission of evidence as well as for erroneous instructions given at the request of plaintiffs.

The physical facts, established, we think, by a preponderance of the evidence, are that the well was being dug 5 feet and 6 inches west of the strip of land occupied by the public utility. The posts upon which defendant's wires were strung were set in the center of the strip. The distance from the well to a point directly under the nearest power line was 15 feet and 6 inches by actual measurements. On each of the poles were two cross-arms. Two wires were on the top of the top cross-arm. One of these was a primary wire carrying 2300 volts of electricity. The other was a neutral wire. Three wires were attached to the lower cross-arm. These carried 115 to 120 volts of electricity to the ground. The distance between the poles next north and south of the place where the accident occurred was by actual measurement 240 feet. The accident happened about midway between these two poles. The poles were 30 feet long and set in the ground about 5 feet from the surface. The wires on the top cross-

and each brought suit against defendant and each brought suit against defendant, charging negligence. The defendant was severely injured at the same time and place brought suit against defendant, charging negligence. The defendant tried together and verdicts entered in favor of the plaintiff. Each of the estates of those who died was valued at \$10,000, and defendant were entered in favor of each plaintiff. Verdicts were entered in favor of each plaintiff. Verdicts were entered in favor of each plaintiff.

It is contended for reversal that the defendant for defendant requested at the close of all the evidence, should in each case have been given; that the persons injured were not in the exercise of due care; that a new trial should have been given because the verdicts were against the manifest weight of the evidence, and because of errors in the ruling of the court on the admission of evidence as well as for erroneous instructions given at the request of plaintiff.

The physical facts, established, we think, by a preponderance of the evidence, are that the well was 3 feet and 6 inches west of the strip of land occupied by the public utility. The posts upon which defendant's wires were strung were set in the center of the strip. The distance from the well to a point directly under the nearest power line was 15 feet and 6 inches by actual measurements. On each of the poles were two cross-arms. Two wires were on the top of the cross-arms. One of these was a primary wire carrying 7000 volts of electricity. The other was a neutral wire. Three wires were attached to the lower cross-arm. These carried 115 to 120 volts of electricity to the ground. The distance between the poles next north and south of the place where the accident occurred was by actual measurement 840 feet. The accident happened about midway between these two poles. The poles were 30 feet long and set in the ground about 5 feet from the surface. The wires on the top cross-

arms of the poles were 24 feet and 5 inches above the ground. The wires on the lower cross-arms at the poles were 22 feet and 5 inches above the ground. The point of lowest sag of the wires on the lower cross-arm was 18 feet and 3 inches above the ground. The point of lowest sag of the wires on the top cross-arms was 19 feet and 10 inches above the ground.

The auger was operated by turning it around by hand using a pipe wrench. As the depth of the well increased pieces of galvanized pipe were attached to the auger. The driller had pieces of galvanized pipe 6 inches in diameter and about 10 feet long. After the auger was sunk 2 or 3 feet, the method used was to screw on to the auger one of these pieces of pipe. When the well had been sunk to a depth of 10 feet another piece of 10 foot pipe was attached. The diggers had with them five pieces of such pipe, each 10 feet in length. Their method of drilling was to screw the auger into the ground, then pull it out and clean the dirt out of it. The three men started to work about 10 or 10:30 o'clock in the morning of April 3, 1938. They began by constructing a foundation for a building on space measured off on the lot and dug a trench about the space 18 inches deep and about 22 square feet of ground. Then they began to dig the well, quit for lunch, returned in the afternoon and continued to work at the well until the accident happened.

This subdivision was laid out in 1935. Defendant's transmission lines were completed in 1937. There was no insulation covering the wires. There were no signs warning persons working about any danger from the wires.

DeAngelo testified the weather was windy and cold that day. He says that after drilling down 3 feet they connected a 10 foot pipe to the auger. He says he was holding the pipe straight up while Martin and "Pete" bent down and turned it all

arms of the poles were 24 feet and 24 inches above the ground. The wires on the lower cross-arms at the poles were 10 feet and 10 inches above the ground. The point of lowest sag of the wires on the lower cross-arms was 18 feet and 18 inches above the ground. The point of lowest sag of the wires on the top cross-arms was 19 feet and 19 inches above the ground.

The auger was operated by turning it around by hand using a pipe wrench. As the depth of the well increased pieces of galvanized pipe were attached to the auger. The miller had pieces of galvanized pipe 6 inches in diameter and about 10 feet long. After the auger was sunk 2 or 3 feet, the method used was to screw on to the auger one of these pieces of pipe. When the well had been sunk to a depth of 10 feet another piece of 10 foot pipe was attached. The diggers had with them five pieces of such pipe, each 10 feet in length. Their method of drilling was to screw the auger into the ground, then pull it out and clean the dirt out of it. The three men started to work about 10 or 10:30 o'clock in the morning of April 3, 1938. They began by constructing a foundation for a building on space reserved off on the lot and dug a trench about the space 13 inches deep and about 28 square feet of ground. Then they began to dig the well, quit for lunch, returned in the afternoon and continued to work at the well until the accident happened.

This subdivision was laid out in 1938. Respondent's transmission lines were completed in 1937. There was no insulation covering the wires. There were no signs warning persons working about any danger from the wires.

Deangelo testified the weather was windy and cold that day. He says that after drilling down 3 feet they connected a 10 foot pipe to the auger. He says he was holding the pipe straight up while Martin and "Fete" bent down and turned it all

around, and that after they got the drill down to where they used up the first 10 feet of pipe they put on another 10 feet of the same pipe. He says that at the time of the accident they pulled out the pipe; that "I was holding the pipe straight and they pulled out on the pipe and I heard some kind of noise, I don't know what you call it, some noise from the top, and they all fell, the whole 3 of them. All 3 of us fell down. At the time I heard the noise I held the pipe straight. The pipe was not curved, it was a straight pipe. The hole was about 6 inches wide [apparently diameter]. We had two sections of this 10 foot pipe on the drill and 3 left on the ground. The 2 pipes 20 feet and there was about 3-1/2 about 23 or 24 feet. This noise I heard was on the top. At one time the wire sizzled like that, I can't explain it any better. On that day I had on shoes with rubber soles. * * * After the sizzling I woke up again and saw the sun shining. I don't know how long I was laying down there. I saw Peter and Martin laying on the ground there. I didn't see the pipe. Oh, yes, the pipe was laying down there. The pipe was laying down and falling on top of the body there. I mean on top of Martin."

By actual measurements the sag on the top wire was 4 feet and 7 inches, and this was the wire which carried 2300 volts. It was the only wire which carried a load sufficient to have caused the death of these men. The cross-arm on the poles was 5 feet and 7 inches long. The wire closest to the property on which the well was being dug was more than 7 feet inside the easement of the utilities company. The well was some distance from the west boundary line of the easement. The maximum sag in the primary wire was 4 feet and 7 inches. The maximum sway in this wire physically possible would be until it was on the same horizontal plane as the cross-arm. At the maximum sway of the

around, and that after they got the drill down to where they used up the first 10 feet of pipe they put in another 10 feet of the same pipe. He says that at the time in the afternoon they pulled out the pipe; that "I was holding the pipe steady and they pulled out on the pipe and I heard some kind of noise, I don't know what you call it, some noise from the top, and they all fell, the whole 3 of them. All 3 of us fell down. At the time I heard the noise I held the pipe steady. The pipe was not curved, it was a straight pipe. The hole was about 6 inches wide [apparently diameter]. We had two sections of this 10 foot pipe on the drill and 3 left on the ground. The 3 pipes 30 feet and there was about 3-1/2 about 25 or 34 feet. This noise I heard was on the top. At one time the wire sounded like that, I can't explain it any better. On that day I had on shoes with rubber soles. * * * After the sinking I took up again and saw the sun shining. I don't know how long I was laying down there. I saw Peter and Martin laying on the ground there. I didn't see the pipe. Oh, yes, the pipe was laying down there. The pipe was laying down and falling on top of the body there. I mean on top of Martin."

By actual measurements the sag on the top wire was 4 feet and 7 inches, and this was the wire which carried 3300 volts. It was the only wire which carried a load sufficient to have caused the death of these men. The cross-arm of the pole was 5 feet and 7 inches long. The wire closest to the property on which the well was being dug was more than 7 feet inside the easement of the utilities company. The well was some distance from the west boundary line of the easement. The maximum sag in the primary wire was 4 feet and 7 inches. The maximum away in this wire physically possible would be until it was on the same horizontal plane as the cross-arm. At the maximum away of the

wire it would be still more than 2 feet east of the west line of the easement. The average velocity of the wind on this day was 13.7 miles per hour, and there was a momentary velocity of 40 miles per hour for a time, the wind blowing from the southwest. The southwest wind would tend to carry the wire away from instead of toward the well. The distance from the well to a point directly underneath the nearest wire was 15 feet and 6 inches. The well at the time the accident occurred was at a depth of 23 feet and 3 inches. The total length of the pipe attached as it was to the auger was 31 feet by actual measurement.

As we have already stated, none of the wires were insulated and no warning signs of any kind were placed in that vicinity. We hold, however, there was nothing in the situation such as would cast on the defendant company the duty of giving warning, as was the case in Merlo v. Public Service Company, et al., 313 Ill. App. 57, 38 N.E. 2d, 986. ~~There the proof showed that~~ There the proof showed that the Public Service Company had actual notice of the work being done and of its dangerous character. In this case the defendant had no reason to suppose the well was being dug on Mr. Hilger's lot, or knowledge of the manner in which it was being dug.

The physical facts (as the same appear from actual measurements) are such as to leave little doubt of the way this accident occurred. It is true numerous witnesses for plaintiffs gave evidence as to the physical situation with reference to the transmission wires and the well from which it might be inferred that the line swayed over and came in contact with the auger and pipe attached to it, which were straight up, but their opinions were mere estimates made some three years after the accident in question occurred. As against undisputed actual measurements evidence of this kind (while admissible) would have little weight. In Louthan v. Chicago City Ry. Co., 198 Ill. App. 329 at 333, we

wind it would be still more than 2 feet more than the
of the agreement. The average velocity of the wind was
was 13.7 miles per hour, and there was a maximum velocity of
40 miles per hour for a time, the wind blowing from the
west. The southwest wind would tend to carry the line
instead of toward the well. The distance from the well to the
point directly underneath the nearest wire is 15 feet
inches. The well at the time the pool at occurred was at
depth of 23 feet and 3 inches. The total length of the wire
attached as it was to the pump was 11 feet 11 inches in length.
As we have already stated, none of the facts of the
related and no warning signs of any kind were located in that
vicinity. We hold, however, there was nothing in the situation
such as would cast on the defendant company the duty of giving
warning, as was the case in Merfio v. Public Service Company, et al.
313 Ill. App. 57, 38 N.E. 2d, 988. There the court found that
the Public Service Company had actual notice of the fact being
done and of its dangerous character. In this case the defendant
had no reason to suppose the well was being dug on Mr. Higgins's
lot, or knowledge of the manner in which it was being dug.
The physical facts (as the case stands) are actual warn-
ing signs (as much as to leave little doubt of the fact being
done occurred. It is true that the defendant company
gave evidence as to the physical situation of the well, and the
transmission wires and the well from which it was being dug
that the line sagged over and came in contact with the ground
pipe attached to it, which were straight up, and their relation
were more estimated than actual. Some three years after the accident in
question occurred, as a kind of anticipated actual warning
evidence of this kind (while anticipated) would have little weight
in Louhan v. Chicago City Ry. Co., 188 Ill. App. 2d 57, 188

said such evidence was "Exceedingly inaccurate and very unreliable".

We deem it unnecessary to discuss the questions raised as to the different respects in which it is urged the jury might have found defendant guilty of negligence. It was essential to the case of each plaintiff that it should be proved the party injured at the time of the accident was in the exercise of due care for his own safety. In the face of absolutely certain evidence, which compels, as it seems to us, the conclusion that as the well became deeper the diggers attached pieces of pipe to the auger making it of dangerous length, we are persuaded that contact with this dangerous wire was made only by permitting the pipe attached to the auger to fall over and upon the wire.

Under the law as stated by the court, it was necessary, in order that plaintiffs might recover, that the jury should find they were at the time they were injured in the exercise of reasonable care. The jury must have so found, but their verdicts, for the reason just stated, are against the evidence. For that reason a new trial should have been granted. For the error in denying that motion the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Mc Surely, P. J., and O'Connor, J., concur.

self such evidence was 'sufficiently' to establish the fact of 'able'.

We deem it unnecessary to discuss the question of the
 as to the different respects in which it is stated that they might
 have found defendant guilty of negligence. It was contended
 to the case of each plaintiff that it should be found that they
 injured at the time of the accident was in the exercise of
 care for his own safety. In the face of absolutely certain
 evidence, which compels, as it seems to us, the conclusion that
 as the well became deeper the danger increased, it is not
 to the sugar making it of dangerous length, we are persuaded
 that contact with this dangerous wire was not only of assistance
 the pipe attached to the sugar to fall over and upon the wire.
 Under the law as stated by the court, it was necessary
 in order that plaintiffs might recover, that the jury should find
 they were at the time they were injured in the exercise of reason-
 able care. The jury must have so found, and shall we say, for
 the reason just stated, and against the evidence. For that
 reason a new trial should have been granted. For the error in
 denying that motion the judgment will be reversed and the cause
 remanded.

REVEREND A. C. GORDON.

Mo. Ex. Ct., I. C., and O'Connor, J., dissent.

41873

JAY W. RAPP, Administrator of the
Estate of George Tong, Deceased,
Appellant,

v.

GRACE E. GOERLITZ and CHARLES GOERLITZ,
Appellees.

}
} APPEAL FROM

}
} SUPERIOR COURT,

}
} COOK COUNTY. 143

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

314 I.A. 191

This appeal is from the same order we reversed in part in No. 41939, opinion filed this day. Defendants (mother and son) were sued by the administrator to recover damages under the statute for alleged negligence on September 19, 1940, from which the deceased received the injuries from which he died. The first count of the complaint charged negligence; the second wilful, wanton and malicious conduct. Summons was served on both defendants December 13, 1940; their defaults entered January 9, 1941. On January 17 there was a trial, defendants not appearing. There was a verdict of guilty as to both with damages assessed at \$10,000.00, and judgment.

March 10, 1941, defendants filed a motion in the nature of writ of error coram nobis under §72 of the Civil Practice Act. They moved the judgment be set aside and a new trial granted. The ground of the motion as to Charles was that he was a minor. The motion as to him was denied. The ground of the motion as to Grace E. Goerlitz was an excusable mistake on her part through which she failed to appear and interpose her defense. The plaintiff made a motion to strike defendants' motion under §72 and the affidavits supporting it. The court, however, considered the motions and also heard oral evidence with the result stated. This particular appeal is by plaintiff from that part of the order which set aside the judgment as to Grace E. Goerlitz.

The plaintiff contends (citing a number of well known authorities, such as Marabia v. Mary Thompson Hospital, 309 Ill.

JAY W. BART, Administrator of the
Estate of George Torg, Deceased,
Appellant,

v.

GRACE E. GOERTLITZ and CHARLES GOERTLITZ,
Appellees.

MR. JUSTICE MATHESON delivered the opinion of the court.

This appeal is from the same order we reversed in part in No. 41852, opinion filed this day. Defendants (mother and son) were sued by the administrator to recover damages under the statute for alleged negligence on September 12, 1940, from which the deceased received the injuries from which he died. The first count of the complaint charged negligence; the second willful, wanton and malicious conduct. Damages were sought on both counts ante December 12, 1940; their details entered January 2, 1941. On January 17 there was a trial, defendants not appearing. There was a verdict of guilty as to both with damages assessed at \$10,000.00, and judgment.

March 10, 1941, defendants filed a motion in the nature of writ of error coram nobis under §73 of the Civil Practice Act. They moved the judgment be set aside and a new trial granted. The ground of the motion as to Charles was that he was a minor. The motion as to him was denied. The ground of the motion as to Grace E. Goertlitz was an excusable mistake on her part through which she failed to appear and interfere for defense. The plaintiff made a motion to strike defendants' motion under §73 and the affidavit supporting it. The court, however, considered the motions and also heard oral evidence with the result stated. This particular appeal is by plaintiff from that part of the order which set aside the judgment as to Grace E. Goertlitz. The plaintiff contends (citing a number of well known authorities, such as Marple v. Mary Thompson Hospital, 20 Ill.

147; Chapman v. North American Ins. Co., 292 Ill. 179; Linehan v. Travelers Ins. Co., 370 Ill. 157; Cramer v. Illinois Commercial Men's Ass'n., 260 Ill. 516) that ordinarily a court is without power, after the expiration of the term, to set aside a final judgment; that the motion in the nature of a writ of error coram nobis is not intended to relieve a party from the consequences of his own negligence, and the writ does not lie to review an error or mistake of the court in point of law but must concern some error of fact, not of record, which if known to the court would have prevented the entry of the judgment. Generally speaking, the cases cited sustain these rules.

The facts disclosed to the court by the affidavits and the evidence taken are that Mrs. Goerlitz at the time of the accident in question, was operating a restaurant at 1148 Wells Street in Chicago, and that she owned an automobile which, at the time of the accident in which Mr. Tong lost his life, was being driven by her son 19 years of age. Suit was brought against mother and son, and summons was served by leaving copies thereof with Mrs. Goerlitz. She had in her employ in the restaurant a cook (Jack Kalles) whom she had known for about three years. When she received copies of summons she handed the papers to Kalles and told him to go to the office of Chadwick, Johnson & Leone, attorneys for the plaintiff, and "see what it was all about". She did not receive the papers back, but Kalles returned on the same day and told her that he had a conversation with Mr. Chadwick of plaintiff's firm, and that Mr. Chadwick had told him that he would not file any suit until he saw Mrs. Goerlitz. She admits that she did not go to see Mr. Chadwick after that and never saw or talked with him. She says she was going to do so, but he never called her and she was busy. She could read English, knew she was being sued for \$10,000, knew that her son

had an accident in which a person had been killed, and at a Coroner's inquest which was held after the death of Mr. Tong, she was represented by her attorney, Mr. Chones. She also attended the inquest herself. She never told Kalles to talk to Chones or to go over and see whether he could make a settlement. She never asked Mr. Chones to represent her in seeing whether she could make a settlement. She did not go to see Mr. Chones until February 24, which was after the judgment had been entered.

Kalles testified that he took the copies of the summons to Mr. Chadwick's office and talked with him about it. The result of their talk was that Mr. Chadwick said he was not going to file any suit until Kalles would bring Mrs. Goerlitz in after the holidays to his office to see if they could come to some kind of settlement. Kalles says that he left the office and left the summons there with Chadwick. He also says that Chadwick called him up afterwards and asked when he was going to bring Mrs. Goerlitz to the office, and he said he would try and bring her in as soon as he could. Kalles says he does not remember whether Chadwick asked him to leave the summons there, but he left the papers with him on the desk. He says that Chadwick said he was not going any farther, that he would wait "until you bring Mrs. Goerlitz to this office". Kalles says that when he left the lawyer's office he came back, but he does not remember what for. He denies that he forgot any papers, says he didn't come back to pick them up from Mr. Chadwick's desk, and that he did not come back and say that he had forgotten his papers. He says he can't tell what he came back for. He says that he never went back to the lawyer's office, but that he told Mrs. Goerlitz she would have to go down there to try and negotiate a settlement with him. The son Charles was not present at any of these conversations, and Kalles never

-3-

had an accident in which a person had been killed, and as a
Coroner's inquest which was held after the death of the person,
she was represented by her attorney, Mr. Gorman. She also
attended the inquest herself. She never told Kallie to talk
to Gorman or to go over and see whether he could make a settle-
ment. She never asked Mr. Gorman to represent her in seeing
whether she could make a settlement. She did not go to see
Mr. Gorman until February 24, which was after the judgment
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office he came back, but he does not remember what for. He thinks
that he forgot any papers, says he didn't come back to pick them
up from Mr. Chadwick's desk, and that he did not come back and
say that he had forgotten his papers. He says he can't tell what
he came back for. He says that he never went back to the lawyer's
office, but that he told Mrs. Gorman she would have to go down
there to try and negotiate a settlement with him. The son Charles
was not present at any of these conversations, and Kallie never

talked with Mr. Chones, the attorney, about having been to the lawyer's office, although he knew Chones had represented Mrs. Goerlitz at the Coroner's inquest. He says he told her that she was expected to go down to see Chadwick some time after the holidays. He did not know whether she did so or not.

Mr. Chadwick testified Kalles was a stranger to him; came to his office, said that while he was not a lawyer he came to see about the Goerlitz suit. Chadwick talked with him a few minutes about the suit, gave him the particulars and suggested a conference between himself and the lawyer representing Mrs. Goerlitz. He also suggested that one of the Tong boys and Mr. Rapp, the administrator of the estate, might be at the conference. He says he talked with Kalles about forty minutes. Mr. Chadwick said he did not ask Mr. Kalles to leave the summons with him, and he did not do so. He says, however, that after leaving the office Kalles came back, said he had forgotten his papers, picked up the summons from the desk and took it away with him. Chadwick knew that Mr. Chones was the attorney at the inquest, and Mr. Leone of his office got in touch with Chones with reference to a settlement. He says that he suggested Mr. Chones be called into a conference. Whether Mr. Chones was called up he does not know, but he had not told anybody to call him. He says that he afterwards went to Mrs. Goerlitz' house to see her but she wouldn't answer the bell. He saw her on the back porch.

Mrs. Chadwick, who acted as secretary to her husband, testified that Kalles was at the office at the time in question and asked to see Mr. Chadwick; that she ushered him in; that he stayed a considerable time; that after he came out he came back and said he had forgotten his papers, and she told him he might go into Mr. Chadwick's room again. She saw him come out and he had a yellow piece of paper in his hand. Mrs. Chadwick's testimony is corroborated by that of Miss Vollriede, a stenographer

talked with Mr. Gorton, the attorney, who was in the
lawyer's office, although he was Gorton and suggested that
Gorlitz at the Gorton's address. He said he would let her
was expected to go down to see Chadwick some time after the next
day. He did not know whether she would or not.

Mr. Chadwick testified that he was a stranger to him;
came to his office, said that while he was not a lawyer he came
to see about the Gorlitz suit. Chadwick talked with him a few
minutes about the suit, gave him the partition and suggested
a conference between himself and the lawyer representing her.
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Mrs. Chadwick, who acted as secretary to her husband,
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and asked to see Mr. Chadwick; that she ushered him in; that he
stayed a considerable time; that after he came out he came back
and said he had forgotten his papers, and she told him he might
go into Mr. Chadwick's room again. She saw him come out and he
had a yellow piece of paper in his hand. Mrs. Chadwick's testi-
mony is corroborated by that of Miss Volkmann, a stenographer

and receptionist in the lawyer's office.

The affidavit of Mrs. Goerlitz states that she understood no suit or action had been taken and not receiving the summons back she relied upon the representations reported by Kalles and did not file any appearance or answer in the cause; that she did not know she was to see Mr. Chadwick at any particular time and believed no further action would be taken until the matter was discussed; that, as a matter of fact, she afterwards employed Mr. Chones on February 24, 1941, and he reported back to her that judgment by default had been entered against her for \$10,000.

There has been in recent years quite a development of the law in relation to motions in the nature of a writ of error coram nobis. In People v. Green, 355 Ill. 468, the Supreme Court said that among other reasons which would justify the issuance of the writ was "where by some excusable mistake or ignorance of the accused, or without negligence on his part, he has been deprived of a defense which he could have used at his trial, and which, if known by the court, would have prevented a conviction". In so far as Mrs. Goerlitz is concerned this would seem to be the only ground upon which her motion may be justified. It is apparent from the remarks of the trial judge that he was persuaded to the ruling he made largely by the fact that the evidence taken and the affidavits filed by all the parties convinced him a judgment for \$10,000 had been entered against Mrs. Goerlitz when she was not liable at all. Courts are reluctant to permit judgments of that kind to stand, and the question of whether Mrs. Goerlitz was negligent depends very much upon her own knowledge of language, customs, etc. For a business man with some knowledge of the practice of the courts her conduct could hardly be said to be excusable. For a woman without such knowledge to rely upon

and receptionist in the lawyer's office.

The affidavit of Mrs. Goerlitz stated that she understood

stood no suit or action had been taken and not having the
summons back she relied upon the representation reported by
Kallie and did not file any appearance or answer in the case;
that she did not know she was to see Dr. Gendrick at any particular
time and believed no further action would be taken until
the matter was discussed; that, as a matter of fact, she afterwards
employed Mr. Thomas on February 24, 1941, and he reported
back to her that judgment by default had been entered against
her for \$10,000.

There has been in recent years quite a development of
the law in relation to motions in the nature of a writ of error
coram nobis. In People v. Green, 355 Ill. 468, the Supreme Court
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of the writ was "where by some excusable mistake or ignorance
of the accused, or without negligence on his part, he has been
deprived of a defense which he could have used at his trial, and
which, if known by the court, would have prevented a conviction".
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to the ruling he made largely by the fact that the evidence before
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for \$10,000 had been entered against Mrs. Goerlitz when she
was not liable at all. Courts are reluctant to permit judgments
of that kind to stand, and the question of whether Mrs. Goerlitz
was negligent depends very much upon her own knowledge of law-
usage, customs, etc. For a business man with some knowledge of
the practice of the courts her conduct could hardly be said to
be excusable. For a woman without any knowledge to rely upon

representations made to her is different.

Defendant makes much of the fact Mr. Chadwick testified in a case in which he was also attorney, but the circumstances were unusual and no other had the knowledge which Mr. Chadwick possessed. The evidence does not justify an inference that Mrs. Goerlitz was intentionally deceived. The trial court was apparently of the opinion that Mrs. Goerlitz had been misled and that through excusable mistake or ignorance she relied upon the conversation reported to her by Kalles and so failed to interpose her defense. The trial court saw the parties and had a better opportunity to decide that question than a court of review. In a matter of this kind it is usual to follow the ruling which will give every party their day in court. The line between excusable mistake and negligence is difficult to determine.

Defendant cites many cases from this and other states where a judgment has been vacated under circumstances quite similar to those here appearing. State Board of Agriculture v. Meyers, 13 Colo. App. 500, 58 Pac. 879; Elliott v. Quinn, 40 Colo. 328, 90 Pac. 607; Council Bluffs Loan & T. Co. v. Jennings, 81 Iowa 470, 46 N. W. 1006; Putnam v. Murphy, 53 Ill. 404, distinguished in Precision Products Co. v. Gady, 233 Ill. App. 77. The order will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

41939

JAY W. RAPP, Administrator of the
Estate of George Tong, Deceased,
Appellee,

v.

GRACE E. GOERLITZ and CHARLES GOERLITZ,
Defendants.

66
APPEAL FROM

SUPERIOR COURT,
COOK COUNTY. 144

On Appeal of CHARLES GOERLITZ,
Appellant.

314 I.A. 191²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by Charles Goerlitz, one of two defendants in an action brought by the administrator of the estate of George Tong to recover damages for the benefit of the next of kin on account of alleged negligence of Charles Goerlitz in driving an automobile on September 19, 1940, averred to have been the cause of the death of the intestate. Plaintiff filed with his complaint a demand for trial by jury. Summons was served on both defendants December 13, 1940. An order was entered January 9, 1941, defaulting both defendants and setting the cause for January 17, 1941. Upon the hearing, defendants not further appearing, the evidence was taken and a motion by plaintiff to instruct the jury to return a verdict for the plaintiff and assess damages at not to exceed the sum of \$10,000 was given by the court. The verdict was returned and damages assessed at the full amount of the demand (\$10,000) and the court entered judgment on the verdict.

March 10, 1941, the defendants filed a motion in the nature of a writ of error coram nobis under §72 of the Practice Act (Smith-Hurd's Anno. Stat., Chap. 110, par. 196, p. 782) to vacate and set aside the order of default and grant leave to the defendants to plead or answer the complaint. In support of this motion defendant Charles Goerlitz set forth that during the month

JAY W. RAPP, Administrator of the
Estate of George Tong, Deceased,
Appellee,

v.

GRACE E. GOENLITZ and CHARLES GOENLITZ,
Defendants.

On Appeal of GRACE E. GOENLITZ,
Appellant.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by Charles Goenlitz, one of two

defendants in an action brought by the administrator of the estate of George Tong to recover damages for the benefit of the next of kin on account of alleged negligence of Charles Goenlitz in driving an automobile on September 10, 1940, alleged to have been the cause of the death of the intestate. Plaintiff filed with his complaint a demand for trial by jury. Summons was served on both defendants December 15, 1940. An order was entered January 8, 1941, defaulting both defendants and setting the case for January 17, 1941. Upon the hearing, defendants not further appearing, the evidence was taken and a motion by plaintiff to instruct the jury to return a verdict for the plaintiff and assess damages at not to exceed the sum of \$10,000 was given by the court. The verdict was returned and damages assessed at the full amount of the demand (\$10,000) and the court entered judgment on the verdict.

March 10, 1941, the defendants filed a motion in the nature of a writ of error coram nobis under 578 of the Practice Act (Smith-Hurd's Anno. Stat., Chap. 110, par. 198, p. 782) to vacate and set aside the order of default and grant leave to the defendants to plead or answer the complaint. In support of this motion defendant Charles Goenlitz set forth that during the month

of January, 1941, and at the time of making the affidavit, he was a minor of the age of 19 years, and that no guardian had been appointed for him. He also set up that he did not know any suit was pending against him and learned shortly after February 24, 1941, that the judgment had been entered against him on January 17 for \$10,000. His affidavit averred that he had a good defense to the cause of action, specifying that he was not negligent in the manner alleged in the complaint; that the deceased was not in the exercise of due care, and that he (defendant) did not act wilfully, wantonly or maliciously, as alleged in one of the counts of the complaint. A rule was entered on the plaintiff to answer the written motion within 5 days. The motion was heard by the court upon the motion of the plaintiff to strike the motion in the nature of the writ of error coram nobis and upon affidavits and testimony received in open court. An order was entered sustaining the motion as to the defendant, Grace E. Goerlitz, and vacating the judgment as to her, but as to the defendant, Charles Goerlitz, the motion was denied and an order entered that the judgment theretofore entered against him stand.

The motion to strike admitted, and, at any rate, the undisputed evidence taken showed, that Charles Goerlitz was a minor 19 years of age at the time the accident occurred in which Mr. Tong received injuries which resulted in his death. It was held in Peak v. Shasted, 21 Ill. 137, that a minor could only appear to defend by a guardian and not in person or by attorney, and that in case the minor failed to appear to have a guardian appointed it was the duty of the court, on application by plaintiff, to appoint a guardian, which, to be regular, must be done before plea; and that if an infant appear in person or by attorney, it is error in fact, which may be assigned in the court in which

of January, 1941, and at the time of the accident, he was a minor of the age of 13 years, and thus no guardian had been appointed for him. He also had no guardian at the time any suit was pending against him and, I submit, shortly after February 24, 1941, that the judgment and order entered against him on January 17 for \$10,000. His attorney advised that he had a good defense to the cause of action, contending that he was not negligent in the manner alleged in the complaint; that the deceased was not in the exercise of due care, and that he (defendant) did not act willfully, wantonly or maliciously, as alleged in one of the counts of the complaint. He was ordered on the plaintiff to answer the written motion within 3 days. The motion was heard by the court upon the motion of the plaintiff to strike the motion in the nature of the writ of error coram nobis and upon affidavits and testimony received in open court. An order was entered sustaining the motion as to the defendant, Grace A. Goonite, and vacating the judgment as to her, but as to the defendant, Charles Goonite, the motion was denied and an order entered that the judgment therefor stand against him stand. The motion to strike admitted, and, at any rate, the undisputed evidence taken showed, that Charles Goonite was a minor 13 years of age at the time the accident occurred in which Mr. Tong received injuries which resulted in his death. It was held in Bank v. Bank, 21 Ill. 137, that a minor could only appear to defend by a guardian and not in person or by attorney, and that in case the minor failed to appear to have a guardian appointed it was the duty of the court, on application by plaintiff, to appoint a guardian, which, to be regular, must be done before plea; and that if an infant appear in person or by attorney it is error in fact, which may be assigned in the court in which

the judgment was rendered, and the judgment may be set aside upon proper motion, even after the term at which it was entered. The limitation of time for the filing of such a motion is fixed by §72 of the Practice Act at 5 years. Other cases which announce a similar rule are White v. Kilmartin, 205 Ill. 525, 526, 527; McCarthy v. Cain, 301 Ill. 534, 538, 539; and Simpson v. Anderson, 305 Ill. 172, 175.

The plaintiff says: "The primary question here is: was the motion in the nature of a writ of error coram nobis properly filed in the original proceeding from which it prays relief and as a part thereof, after term time had expired? and had the trial Court jurisdiction to determine the motion?" Plaintiff, under his Points and Authorities, cites Seither & Cherry Co. v. Board of Education, 283 Ill. App. 392; People v. McArthur, 283 Ill. App. 467, and Topel v. Personal Loan & Savings Bank, 280 Ill. App. 558. In the argument, however, these cases are not analyzed. As a matter of fact, we do not know of any such motion that has ever been filed other than in the original suit. As these cases hold it is true, of course, the motion (nevertheless) is considered in the nature of a new suit. On the record we hold the defendant minor was entitled to have his motion granted and the judgment set aside. For the error in denying it the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

the judgment was rendered, and the judgment was entered upon proper motion, even after the term at which it was entered. The limitation of time for the filing of such a motion is fixed by §75 of the Practice Act of 1907. Other cases which announce a similar rule are White v. White, 203 Ill. 515, 523, 527; McCarthy v. Cain, 207 Ill. 544, 552, 554; and Johnson v. Johnson, 208 Ill. 175, 176.

The plaintiff says: "The primary question here is: was the motion in the nature of a writ of error cognizable properly filed in the original proceeding from which it gave relief and as a part thereof, after term time had expired and had the trial Court jurisdiction to determine the motion?" Plaintiff, under his Points and Authorities, cites Belcher & Cherry Co. v. Board of Education, 283 Ill. App. 322; People v. Acarthur, 203 Ill. App. 487, and People v. Personal Loan & Savings Bank, 280 Ill. App. 526. In the argument, however, these cases are not analyzed. As a matter of fact, we do not know of any such motion that has ever been filed other than in the original suit. As these cases hold it is true, of course, the motion (nevertheless) is considered in the nature of a new suit. On the record we hold the defendant minor was entitled to have his motion granted and the judgment set aside. For the error in denying it the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

McCarthy, J., and O'Connor, J., concur.

41823

HARRY L. DRAKE,)
Appellant,)
v.)
EUGENE V. DIGGINS,)
Appellee.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

314 I.A. 1921 45

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff caused judgment by confession to be entered against defendant on a written lease for \$274.30. Afterward defendant filed a petition to vacate the judgment and for leave to defend. The judgment was opened up and it was ordered that it stand as security, the petition to stand as defendant's affidavit of defense. Some time afterward, the case was tried before the court without a jury, there was a finding and judgment against plaintiff and he appeals.

The record discloses that August 31, 1939, the parties entered into a written lease whereby an apartment was leased to defendant for a period from October 1, 1939, to September 30, 1940, at a rental of \$58 per month, payable in advance. Defendant and his family occupied the apartment, paid the rent promptly and vacated it about April 29, 1940. The apartment thereafter was vacant for the months of May, June, July and August and it was to recover the rent for these months that plaintiff sues.

Defendant testified that about April 9 or 10, 1940, he went to see D. M. Ruggles who was in charge of renting the building in which the apartment was located; that he told Mr. Ruggles he was contemplating sub-leasing the apartment because his wife had acquired a piece of property and if they could sublet the apartment they were going to move; that Ruggles said he was sorry to lose defendant as a tenant but he then had his secretary prepare a sign to be placed at the building showing the apartment for rent. The sign was placed at the building and shortly

R.S.W.

HARRY L. BRAY,
Appellant,

v.

EDWARD V. TIGGING,
Appellee.

MR. JUSTICE LORAN OR WILLIAMS has said in his opinion:

Plaintiff caused judgment by confession to be entered

against defendant on a written lease for \$24.00, defendant

defendant filed a petition to vacate the judgment and for leave

to defend. The judgment was opened up and it was ordered that

it stand as security, the petition to rescind defendant's affi-

davit of defense. Some time afterward, the case was tried before

the court without a jury, there was a finding and judgment against

plaintiff and he appeals.

The record discloses that August 31, 1939, the apartment

entered into a written lease whereby an apartment was leased to

defendant for a period from October 1, 1939, to September 1,

1940, at a rental of \$8 per month, payable in advance, defendant

and his family occupied the apartment, paid the rent promptly

and vacated it about April 28, 1940. The apartment thereafter

was vacant for the months of May, June, July and August and it

was to recover the rent for these months that plaintiff sues.

Defendant testified that about April 9 or 10, 1940, he

went to see J. M. Hughes who was in charge of renting the build-

ing in which the apartment was located; that he told Mr. Hughes

he was contemplating sub-letting the apartment and Mr. Hughes

had acquired a piece of property and if they could order the

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to lose defendant as a tenant but he then had his secretary pre-

pare a sign to be placed at the building and the apartment

for rent. The sign was placed at the building and shortly

thereafter persons called to see defendant about renting the apartment. That one person who looked at the apartment was pleased with it and was willing to pay \$55 a month instead of the \$58 mentioned in the lease; that this was agreeable to defendant and that he would pay the balance to plaintiff; that the applicant gave defendant references and the next morning defendant called at Ruggles's office and told Ruggles he had a tenant for the apartment; gave his name and told Ruggles the party was well recommended; that Ruggles replied he would not rent it because of racial reasons. Defendant further testified he had two or three other applications and went down to see Mr. Ruggles; that one of the persons offered to pay \$45 a month rent for the apartment but Mr. Ruggles wanted \$60 a month.

Ruggles, called by defendant as an adverse witness for cross examination, testified among other things that before May 1, 1940, he had a telephone conversation with defendant and defendant told him he had bought a two-flat building and was desirous of subletting the apartment and "I told him we would be glad to work with him and help him rent it." That afterward a sign, apparently made at plaintiff's office, was placed in front of the building showing the apartment was for rent. Ruggles further testified that May 11 or 12, he called Mr. Diggins and told him he had a prospective tenant "and Mr. Diggins said he wasn't satisfactory to him." That the prospective tenant wanted to take the apartment the first of June, at \$45 a month until September when the lease by its terms would end. That defendant "never presented me in any way with a tenant." When called as a witness for plaintiff he testified "We don't look into the nationality of a prospective tenant, the only thing we are interested in renting apartments is, can the man pay the rent, and if they have behaved themselves where they lived before."

themselves where they lived before."

There is other evidence in the record but we think it unnecessary to refer to it. The question for decision was one of fact and not of law. The court apparently believed defendant's version that he had submitted a suitable tenant but that Ruggles refused to lease the apartment for racial reasons only. But in the view we take of the case we think this question is immaterial. The lease provided that the apartment should not be sublet without the written consent of the lessor. It also contained the following provision: "If Lessee shall vacate or abandon said premises *** the premises *** may be relet by Lessor for such rent and such terms and such period as Lessor may elect without releasing Lessee from any liability hereunder (but Lessor shall not be required to accept or receive any tenant offered by Lessee or by others)."

Plaintiff's position is that under the terms of the lease he had the right to refuse to sublet the apartment for any reason or for no reason at all. We think this contention must be sustained. The lease provided the Lessor should not be required to accept any tenant offered by the Lessee. In Hirsch v. Home Appliances, Inc., 242 Ill. App. 418, judgment by confession was entered on the lease for failure to pay rent. The provisions in the lease there involved were substantially the same as those in the lease in the case at bar. The defense there interposed was that the tenant had submitted a reliable person who was willing to sublet the premises but that plaintiff refused to lease the premises unless at a large increase of rent. In that case the court discussed the authorities pro and con as to the duty, if any, of the landlord to mitigate the damages in such a situation and after disposing of the question of law on that point the court continued: "But whichever theory or rule should be adopted in this respect, it seems to us (construing the affidavit of defendant most strongly against it, as we must) that it fails

There is other evidence in the record but we think it unnecessary to refer to it. The question of fact and not of law. The court apparently believed that a version that he had submitted a written statement but that Ruggles refused to lease the apartment for racial reasons only. But in the view we take of the case we think this question is immaterial. The lease provided that the apartment should not be sublet without the written consent of the landlord. It also contained the following provision: "If lessee shall vacate or abandon said premises *** the premises *** may be relet by lessor for such rent and such terms and such period as lessor may elect without releasing lessee from any liability hereunder (but lessor shall not be required to accept or receive any tenant offered by lessee or by others)."

Plaintiff's position is that under the terms of the lease he had the right to refuse to sublet the apartment for any reason or for no reason at all. He thinks this contention must be sustained. The lease provided the lessor should not be required to accept any tenant offered by the lessee. In paragraph 7, Home Appliances, Inc., vs. Ill. App. 418, judgment by confession was entered on the lease for failure to pay rent. The provisions in the lease there involved were substantially the same as those in the lease in the case at bar. The defense there interposed was that the tenant had submitted a reliable person who was willing to sublet the premises but that plaintiff refused to lease the premises unless at a large increase of rent. In that case the court discussed the authorities pro and con as to the duty, if any, of the landlord to mitigate the damages in such a situation and after disposing of the question of law on that point the court continued: "But whichever theory or rule should be adopted in this respect, it seems to us (construing the affidavit

to set up a meritorious defense. In the statement of facts we have recited at length the provisions of the lease in anticipation of this point. No case is cited from any court of any State from which it would not be easy to distinguish the record which we must here consider. No case holds, so far as we are aware, that the parties to a lease may not enter into a valid agreement with respect to this question by which the parties would be bound (and when we come to examine the lease it is at once apparent that the parties have specifically agreed that the landlord shall in no case be bound) to do the thing which defendant now contends plaintiff is obligated to do. If there is any decision anywhere which holds that the parties may not contract freely with each other with respect to such a situation as is disclosed by the affidavit of merits, that decision has not been called to our attention."

But defendant contends the provisions of the lease, requiring the consent of the landlord in writing to the subletting of the premises, and the provision that the landlord is not required to accept any tenant offered by the tenant, were waived by plaintiff when Ruggles refused to accept the tenant on solely racial grounds.

We have examined the entire record and are unable to find that the question of waiver was in any way mentioned or referred to in the trial court. Defendant's petition filed in support of his motion to open up the judgment and for leave to defend has no allegation that any provision of the lease had been waived. Moreover, we think there was no waiver but on the contrary that plaintiff was standing on the terms of the written lease. He introduced the lease in evidence, called attention to the fact that no written consent to an assignment was had although the lease required an assignment by the lessor, &

to set up a meritorious defense. In the argument of the no-
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tion of this point. No case is cited from any court of any
from which it would not be easy to distinguish the record which
we must have considered. No case holds, as far as we know,
that the parties to a lease may not enter into a valid agreement
with respect to this question by which the parties would be
bound (and when we come to examine the lease it is at once ap-
parent that the parties have specifically agreed that the land-
lord shall in no case be bound) to do the thing which defendant
now contends plaintiff is obligated to do. If there is any de-
cision anywhere which holds that the parties may not contract
freely with each other with respect to such a situation as is
disclosed by the affidavit of notice, that decision has not been
called to our attention."

But defendant contends the provisions of the lease,
requiring the consent of the landlord in writing to the assignment
of the premises, and the provision that the landlord is not re-
quired to accept any tenant offered by the tenant, were waived
by plaintiff when Hughes refused to accept the tenant on solely
racial grounds.

We have examined the entire record and are unable to
find that the question of waiver was in any way mentioned or
referred to in the trial court. Defendant's position relied in
support of his motion to open up the judgment and to leave to
defendant has no allegation that any provision of the lease had been
waived. Moreover, we think there was no waiver but on the con-
trary that plaintiff was standing on the terms of the written
lease. He introduced the lease in evidence, called attention
to the fact that no written consent to an assignment was had.
Although the lease required an assignment by the tenant, it did not

-5-

For the reasons stated, the judgment of the Municipal court of Chicago is reversed and the cause remanded with directions to reinstate the judgment by confession.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and Matchett, J., concur.

For the reasons stated, the judgment of the court of Chicago is reversed and the cause remanded to that court to rehear the argument of counsel.

REVEREND AND HONORABLE JUDGES OF THE COURT.

Respectfully,
J. J. and Margaret J. Conroy

31420-9-9-
41823

HARRY L. DRAKE,
Appellant,

v.

EUGENE V. DIGGINS,
Appellee

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff caused judgment by confession to be entered against defendant on a written lease for \$274.30. Afterward defendant filed a petition to vacate the judgment and for leave to defend. The judgment was opened up and it was ordered that it stand as security, the petition to stand as defendant's affidavit of defense. Some time afterward, the case was tried before the court without a jury, there was a finding and judgment against plaintiff and he appeals.

The record discloses that August 31, 1939, the parties entered into a written lease whereby an apartment was leased to defendant for a period from October 1, 1939, to September 30, 1940, at a rental of \$58 per month, payable in advance. Defendant and his family occupied the apartment, paid the rent promptly and vacated it about April 29, 1940. The apartment thereafter was vacant for the months of May, June, July and August and it was to recover the rent for these months that plaintiff sues.

Defendant testified that about April 9 or 10, 1940, he went to see D. M. Ruggles who was in charge of renting the building in which the apartment was located; that he told Mr. Ruggles he was contemplating sub-leasing the apartment because his wife had acquired a piece of property and if they could sublet the apartment they were going to move; that Ruggles said he was sorry to lose defendant as a tenant but he then had his secretary prepare a sign to be placed at the building

showing the apartment was for rent. The sign was placed at the building and shortly thereafter persons called to see defendant about renting the apartment. That one person who looked at the apartment was pleased with it and was willing to pay \$55 a month instead of the \$58 mentioned in the lease; that this was agreeable to defendant and that he would pay the balance to plaintiff; that the applicant gave defendant references and the next morning defendant called at Ruggles's office and told Ruggles he had a tenant for the apartment; gave his name and told Ruggles the party was well recommended; that Ruggles replied he would not rent it because of racial reasons. Defendant further testified he had two or three other applications and went down to see Mr. Ruggles; that one of the persons offered to pay \$45 a month rent for the apartment but Mr. Ruggles wanted \$60 a month.

Ruggles, called by defendant as an adverse witness for cross examination, testified among other things that before May 1, 1940, he had a telephone conversation with defendant and defendant told him he had bought a two-flat building and was desirous of subletting the apartment and "I told him we would be glad to work with him and help him rent it." That afterward a sign, apparently made at plaintiff's office, was placed in front of the building showing the apartment was for rent. Ruggles further testified that May 11 or 12, he called Mr. Diggins and told him he had a prospective tenant and Mr. Diggins said he wasn't satisfactory to him." That the prospective tenant wanted to take the apartment the first of June, at \$45 a month until September when the lease by its terms would end. That defendant "never presented me in any

showing the apartment was for rent. The sign was placed at the building and shortly thereafter it was called to see defendant about renting the apartment. That one person who looked at the apartment was pleased with it and was willing to pay \$55 a month instead of the \$45 mentioned in the lease; that this was agreeable to defendant and that he would pay the balance to plaintiff; that the plaintiff gave defendant references and the next morning defendant called at plaintiff's office and told plaintiff he had a tenant for the apartment; gave him name and told plaintiff the party was well recommended; that plaintiff replied he would not want it because of racial reasons. Defendant then called on plaintiff and told him of the applications and was given a check for \$100.00; that one of the persons offered to pay \$45 a month for the apartment but Mr. Higgins wanted \$50 a month. Higgins, called by defendant as an adverse witness for cross examination, testified among other things that before May 1, 1940, he had a telephone conversation with defendant and defendant told him he had bought a two-flat building and was desirous of subletting the apartment and "I told him we would be glad to work with him and help him rent it." That afterwards a sign, apparently made at Higgins's office, was placed in front of the building showing the apartment was for rent. Higgins further testified that May 11 or 12, he called Higgins and told him he had a prospective tenant and Mr. Higgins said he wasn't satisfactory to him. That the prospective tenant wanted to take the apartment the first of June, at \$45 a month until September when the lease by its terms would end. That defendant never presented in any

way with a tenant." When called as a witness for plaintiff he testified "We don't look into the nationality of a prospective tenant, the only thing we are interested in renting apartments is, can the man pay the rent, and if they have behaved themselves where they lived before."

There is other evidence in the record but we think it unnecessary to refer to it. The question for decision was one of fact and not of law. The court apparently believed defendant's version that he had submitted a suitable tenant but that Ruggles refused to lease the apartment for racial reasons only. But in the view we take of the case we think this question is immaterial. The lease provided that the apartment should not be sublet without the written consent of the lessor. It also contained the following provision: "If Lessee shall vacate or abandon said premises *** the premises *** may be relet by Lessor for such rent and such terms and such period as Lessor may elect without releasing Lessee from any liability hereunder (but Lessor shall not be required to accept or receive any tenant offered by Lessee or by others."

✓ Plaintiff's position is that under the terms of the lease he had the right to refuse to sublet the apartment for any reason or for no reason at all. We think this contention must be sustained. The lease provided the Lessor should not be required to accept any tenant offered by the Lessee. In Hirsch v. Home Appliances, Inc. 242 Ill. App. 418, judgment by confession was entered on the lease for failure to pay rent. The provisions in the lease there involved were substantially the same as those in the lease in the case at bar. The defense there interposed was that the tenant had submitted a reliable person who was willing to sublet the premises but that plaintiff

way with a tenant." When called as a witness for Plaintiff he testified "I don't look into the nationality of a prospective tenant, the only thing we are interested in finding apartments is, can the man pay the rent, and if they have behaved themselves here they lived before."

There is other evidence in the record but we think it unnecessary to refer to it. The question for decision was one of fact and not of law. The court apparently believed defendant's version that he had submitted a suitable tenant but that Haggles refused to lease the apartment for racial reasons only. But in the view we take of the case we think this question is immaterial. The lease provided that the apartment should not be subject without the written consent of the lessor. It also contained the following provision: "It is agreed that the lessor or abandon said premises and the premises may be used by lessor for such time and such terms and such period as lessor may direct without prejudice to the lessor's liability hereunder (but lessor shall not be required to accept or reject any tenant offered by lessor or by others)."

Plaintiff's position is that under the terms of the lease he had the right to refuse to subject the apartment for any reason or for no reason at all. We think this contention is sustained. The lease provided the lessor should not be required to accept any tenant offered by the lessor. In White v. Home Appliances, Inc., 242 Ill. App. 418, judgment by consent was entered on the lease for failure to pay rent. The provisions in the lease there involved were substantially the same as those in the lease in the case at bar. The defense there interposed was that the tenant had submitted a reliable person who was willing to subject the premises but that plaintiff

refused to lease the premises unless at a large increase of rent. In that case the court discussed the authorities pro and con as to the duty, if any, of the landlord to mitigate the damages in such a situation and after disposing of the question of law on that point the court continued: "But whichever theory or rule should be adopted in this respect, it seems to us (construing the affidavit of defendant most strongly against it, as we must) that it fails to set up a meritorious defense. In the statement of facts we have recited at length the provisions of the lease in anticipation of this point. No case is cited from any court of any State from which it would not be easy to distinguish the record which we must here consider. No case holds, so far as we are aware, that the parties to a lease may not enter into a valid agreement with respect to this question by which the parties would be bound (and when we come to examine the lease it is at once apparent that the parties have specifically agreed that the landlord shall in no case be bound) to do the thing which defendant now contends plaintiff is obligated to do. If there is any decision anywhere which holds that the parties may not contract freely with each other with respect to such a situation as is disclosed by the affidavit of merits, that decision has not been called to our attention."

But defendant contends the provisions of the lease, requiring the consent of the landlord in writing to the subletting of the premises, and the provision that the landlord is not required to accept any tenant offered by the tenant, were waived by plaintiff when Ruggles refused to accept the tenant on solely racial grounds.

refused to lease the premises unless the plaintiff agreed to
 rent. In that case the court dismissed the application pro
 and con as to the duty, it says, of the landlord to mitigate
 the damages in such a situation and after disposing of the
 question of law on that point the court continued: "But which
 ever theory or rule should be adopted in this respect, it is a
 to us (construing the affidavit of defendant most strongly
 against it, as we must) that it fails to set up a valid
 defense. In the statement of facts we have recited at length
 the provisions of the lease in violation of this point.
 No case is cited from any court in any state from which it
 would not be easy to distinguish the record which we must now
 consider. No case holds, so far as we are aware, that the
 parties to a lease may not enter into a valid agreement with
 respect to this question by which the parties would be bound
 (and when we come to examine the lease it is at once apparent
 that the parties have specifically agreed that the landlord
 shall in no case be bound) to do the thing which defendant
 now contends plaintiff is obligated to do. It there is any
 decision anywhere which holds that the parties may not contract
 freely with each other with respect to such a situation as is
 disclosed by the affidavit of merits, that decision has not been
 called to our attention."
 But defendant contends the provisions of the lease,
 regarding the consent of the landlord in writing to the sub-
 letting of the premises, and the provision that the landlord is
 not required to accept any tenant offered by the tenant, were
 waived by plaintiff when he agreed to accept the tenant
 on solely racial grounds.

We have examined the entire record and are unable to find that the question of waiver was in any way mentioned or referred to in the trial court. Defendant's petition filed in support of his motion to open up the judgment and for leave to defend has no allegation that any provision of the lease had been waived. Moreover, we think there was no waiver but on the contrary that plaintiff was standing on the terms of the written lease. We introduced the lease in evidence, called attention to the fact that no written consent to an assignment was had, although the lease required an assignment by the lessor, etc.

For the reasons stated, the judgment of the Municipal court of Chicago is reversed and the cause remanded with directions to reinstate the judgment by confession.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, F. J., and Matchett, J., concur.

41861

MERLE SLANE,

v.

THE LAKE SHORE INDEX, Incorporated,

THE LAKE SHORE INDEX, Incorporated,
JAMES H. SKEWES and CARL O. SKINROOD,
Appellants,

v.

EVANSTON NEWS INDEX, Incorporated,
MERLE SLANE and FIRST NATIONAL BANK
OF CHICAGO, a Corporation, as Trustee,
Appellees.

69
APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

314 I.A. 192²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

August 2, 1938, Merle Slane filed his complaint in equity in the Superior court of Cook county against The Lake Shore Index, Inc., to foreclose the lien of a trust deed given to secure \$125,000 being the unpaid balance of the purchase price of a newspaper purchased by defendants from plaintiff. Later, on the same day, in the same court, defendants in that case, The Lake Shore Index, Inc., James H. Skewes and Carl O. Skinrood, filed their complaint in two counts. The first count prayed for a rescission of the agreement entered into between the parties October 1, 1936, for the purchase and sale of the newspaper and for a cancellation of the notes and trust deed sought to be foreclosed by Slane, and for an accounting and an injunction. The second count set up a separate legal cause of action for damages. August 5, 1938, the court entered an order consolidating the two causes and that the separate suit of The Lake Shore Index, Inc., for the rescission of the contract and the cancellation of the notes and trust deed be tried first as a separate and distinct equitable cause of action. [Slane's foreclosure suit and the

1913

v.

v.

THE CHICAGO TRADING COMPANY, INC.,
A CORPORATION OF CHICAGO,
Appellee.

THE CHICAGO TRADING COMPANY, INC.,

August 1, 1913, Maria Elena filed his complaint in

equity in the superior court of Cook county against the Chicago
Shore Bank, Inc., to foreclose the lien of a promissory note
to secure \$125,000 dated the 1st day of January, 1913, and
of a promissory note secured by mortgage from Maria Elena,
on the same day, in the same court, and filed in Cook county,
Lake Shore Bank, Inc., James S. McKim and J. C. McKim,
filed their complaint in two counts. The first count charged
a violation of the agreement entered into between the parties
October 1, 1912, for the purchase and sale of the promissory note
for a cancellation of the notes and bank card should be so
closed by Maria, and for an accounting and so forth. The
second count set up a separate legal cause of action for
August 8, 1912, the court entered an order cancelling the
notes and that the separate bill of the Lake Shore Bank, Inc.,
for the violation of the terms of the cancellation of the
notes and bank card should be taken effect as a separate and distinct
equitable cause of action. Maria's counterclaim sets out two

second count of the complaint of The Lake Shore Index, Inc., James H. Skewes and Carl O. Skinrood were held in abeyance.] It was further ordered that the equitable cause be referred to a master in chancery with directions that the proofs be closed within 60 days and that he submit his report within 90 days. The hearing before the master began September 14, 1938, and the last hearing was April 22, 1940. The master made his report June 12, 1940, recommending that the cause be dismissed for want of equity. December 18, 1940, a decree was entered in accordance with the recommendations of the master. The Lake Shore Index, Inc., James H. Skewes and Carl O. Skinrood prosecute this appeal and will be referred to as plaintiffs, and Merle Slane and the Evanston News Index, Inc., as defendants.

We might say that while this suit was pending in the trial court a voluntary petition in bankruptcy was filed by the creditors against defendant, Lake Shore Index, Inc., July 13, 1940, it was adjudged a bankrupt and a trustee appointed who sold all of its property, both real and personal, to Richard H. Jacobson, the successful bidder who has been substituted as a defendant in the instant case.

The record discloses that in 1934 defendant Merle Slane purchased a daily newspaper which for some time had been published in Evanston, the title to which was taken by the Evanston News Index, Inc., a corporation, and continued the publication until October 1, 1936, when a contract was entered into between the Evanston News Index, Inc., and James H. Skewes and Carl O. Skinrood whereby the newspaper plant, including all equipment, was sold to Skewes and Skinrood for \$200,000. Concurrently with the execution of the agreement the first payment of \$50,000 was placed in escrow by the buyers with the Chicago Title & Trust Company

to be paid to the seller November 10, 1936. Possession of the newspaper plant was turned over to the buyers October 1, 1936, and they continued to operate it. Afterward the \$50,000 was turned over to the seller. The trust deed, notes and chattel mortgage on the property to secure the payment of \$125,000 of the purchase price were executed by the buyers. It was to foreclose the lien of this trust deed that Slane filed his complaint, as above mentioned.

To evidence the unpaid balance, \$150,000, of the purchase price, The Lake Shore Index, Inc., executed its three promissory notes, one for \$25,000 due January 15, 1937, one for \$75,000 due in monthly installments of \$600 each, beginning November 1, 1936, to and including September 1, 1941, and the remaining \$39,600 of this note due October 1, 1941, with interest at 4 per cent per annum, payable monthly, and note No. 3 for \$50,000 payable in monthly installments of \$500 beginning November 1, 1941, to and including February 1, 1950, with interest at 4 per cent per annum, payable monthly. The \$25,000 note due January 15, 1937 and the monthly payments thereafter, were made to July 1, 1938, a period of about 22 months although such payments were not always made on the due dates. Default was made in the payment due July 1, 1938, and a month thereafter, August 2, 1938, the bill to foreclose was filed as was also the suit for rescission, cancellation, etc., above mentioned.

The theory of plaintiffs that the contract of October 1, 1936, should be rescinded and the notes and trust deed cancelled, is that they were induced to enter into it through the fraudulent acts of Slane, viz., (1) that in March, 1936, Slane caused a blind advertisement which was fraudulent, to be published in the "Editor and Publisher" a trade magazine, stating the newspaper

was for sale and would show a profit of \$30,000 annually, when in fact it was losing money each month. (2) That in the negotiations between the parties in Chicago, July 23, 1936, a "false profit and loss statement containing the statement that the newspaper had made a net profit of \$10,256.26 for the six months period of from January to June, inclusive, 1936, whereas, in fact, it had lost \$121.86 for that period; (3) the false balance sheet showing the cost of the newspaper to Slane to be \$284,151.25, which was \$159,151.25 more than he paid for it; (4) the ABC books of Slane, in evidence here, containing the official records of the average daily net paid circulation before he sold the newspaper, which records show that the circulation of the newspaper, instead of being 6000 subscribers for the six months prior to October 1, 1936, as represented by Slane to Skewes and Skinrood, was only 3299; (5) the checks of the Evanston News Index, Incorporated, also in evidence, and payable to advertisers for the rebates on their advertising, showing the falsity of Slane's statements that he had never granted rebates to advertisers." (The record is voluminous - more than 6,000 pages.)

The theory of Slane is that he was guilty of no fraud in the negotiations and sale of the newspaper and that James H. Skewes, the dominant party representing the purchasers, was a newspaper man of about 25 years' experience and had bought and sold from 10 to 15 different newspaper properties; that he acted on the information he had received from a number of sources and was not misled by anything Slane did.

The master sustained Slane's contentions, found there was no fraud and recommended the complaint be dismissed for want of equity. The chancellor followed the finding and recommendation of the master and a decree was entered accordingly.

1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 26

(1) As to the false advertisement.

The record discloses that March 7, 1936, Slane caused to be published in "Editor and Publisher" (a trade magazine published in New York City) the following blind advertisement: "A daily newspaper in rich midwest community. Equipment of the best. Will show profit of thirty thousand plus a year. Can be purchased for \$250,000. Appraisal shows physical worth far more. Property demands high type man as publisher. A good organization. Your correspondence in confidence. An opportunity that seldom presents. Address Owner, A-423, Editor & Publisher." Skewes learned that Slane had inserted the advertisement and he came to Chicago in July, 1936. Counsel for plaintiffs complain that this advertisement "failed to state to prospective purchasers that the advertiser had operated the newspaper for four years, during which it had failed to make more than a few dollars profit per year, if it made any profit at all. It also failed to state that the newspaper which could be 'purchased for \$250,000' had been bought by the advertiser two years previously for \$125,000." Other complaints are made which we think it unnecessary to mention here because we think it clear that no one would expect one who was endeavoring to sell a newspaper to advertise that it had made little or no profit during the past 4 years and that 2 years before the advertisement appeared the owner had paid but \$125,000 for it and that it could be purchased for \$250,000.

(2) and (3) As to the false profit and loss statement and the false balance sheet which were exhibited by William M. Layman, representing Slane and the Evanston paper, to Skewes and Skinrood at their meeting in Chicago July 23, 1936:

The evidence shows that Layman, Skewes and Skinrood met July 23, 1936, pursuant to appointment, at Layman's office in

(1) as to the first item.

As stated in the first item, the first item

to be published in the first item, the first item

published in the first item, the first item

"a daily newspaper in this city, the first item

best. All these profits of this newspaper, the first item

purchased for \$25,000. A certain amount of money, the first item

property, the first item, the first item

tion. The correspondence in this item, the first item

several persons. The first item, the first item

known as the first item, the first item

came to Chicago in July, 1937. The first item, the first item

that this advertisement failed to state the first item

that the advertiser had operated the first item

during which it had failed to state the first item

per year, it is not the first item, the first item

that the newspaper which could not be the first item

been bought by the advertiser, the first item

Other complaints are made, the first item, the first item

here because we think it clear that no one, the first item

was endeavoring to sell, the first item, the first item

little or no profit, the first item, the first item

fore the advertisement, the first item, the first item

for it and that it could be purchased for, the first item

(2) and (3) as to the first item, the first item

and the first item, the first item, the first item

Bayern, representing the first item, the first item

skipped at the first item, the first item, the first item

The evidence shows that a year, the first item, the first item

July 23, 1938, pursuant to the first item, the first item

Chicago to discuss the proposed purchase of the newspaper by Skewes and Skinrood. At that meeting shortly after Skewes and Skinrood had introduced themselves, Skewes handed Layman a document asking for certain information about the paper. The information requested that Skewes and Skinrood be given the "Gross income each year for the last five years ending December 31, 1935, or at the close of the fiscal year - 'broken down' into income from the departments as follows: (a) Local Advertising (b) National Advertising (c) Circulation (d) Commercial Printing (e) Miscellaneous"; the cost of production per year after allowing all deductions for depreciation, interest and other charges for the last 5 years; the net profit per year for the last 5 years; certified audit of the business; certified balance sheet and other matters.

The evidence shows the request was refused and the information called for in the document was never given to Skewes and Skinrood. But at that meeting Layman handed Skewes what was designated a "monthly profit and loss summary" of the newspaper from January to June, 1936, which is in the record. It gives the income for each of the 6 months, broken down, also gives the departmental expenses and shows a net profit from the newspaper of \$3,093.94, and a net profit of \$7,162.32 from the job printing department, or a total "Net Profit - All Departments *** \$10,256.26." At the same time Layman handed Skewes and Skinrood a balance sheet of the business of the Evanston News Index which was part of an audit that had been prepared by Layman. The testimony as to what was said by the three men at that meeting is in sharp conflict on many points. Layman's testimony is to the effect that when Skewes presented him his written request for specific information about the newspaper, as above mentioned, he

told Mr. Skewes they might just as well stop talking about the sale because they were not going to deal with Skewes and Skinrood on the basis of profits earned by the paper for the past 5 years. That "All we have to offer you is a plant and an opportunity in the city of Evanston. You may use the appraisal, you may form your own opinions as to the value of the property and the potential development of which the field is capable." Mr. Skewes replied that if he was not to be given the information requested there ought to be some concession made in the price; that he did not believe the plant was worth \$250,000 which Slane was asking for it at the time, unless Skewes was shown some profits. At that time Layman told Skewes he would have to talk with Mr. Slane on that point.

Layman further testified that at that time he handed Skewes and Skinrood the six months' profit and loss summary and the balance sheet. That he explained to Skewes and Skinrood that the figures on the profit and loss summary were prepared "monthly on a budget basis" and no attempt had been made to adjust accurately such things as bad debts, taxes, etc., and that Skewes said: "I have got to find some other basis for determining the value" of the plant. That thereupon Layman produced the balance sheet or audit which was attached to the profit and loss statement. The testimony of Layman, as to what he said at the time in reference to the profit and loss statement, is denied by Skewes and Skinrood, and they testified, that Layman said the business of the newspaper had run down under the Dawes regime but Slane had built it up so as to break even for 1934 and 1935 and had made a net profit of \$10,000 for the first six months of 1936.

The evidence further shows that at the conclusion of the meeting in Layman's office in Chicago, the parties went to the

newspaper plant in Evanston and inspected the plant. Four days after this meeting Mr. Skewes wrote a letter to Layman in which he referred to the meeting of July 23, stated they had endeavored to analyze the figures submitted at the meeting by Layman and "We feel that the volume of business, as well as the value of building and equipment seem to justify further due consideration.

"Hence, despite the somewhat hazardous nature of the field, as well as the apparent paucity of profit, we are very frankly interested in the prospects." That when he returned from California about September 1st "at which time we understand your principal [Slane] will be in Chicago" and submit a definite proposition; that any proposal would naturally be based upon the building and appliances "in the replacement sum of \$69,936 submitted by the Printers Appraisal Company of Chicago under date of November 1, 1934; also appraisal of equipment in the replacement value of \$226,736, by the same appraisal company, under date of October 6, 1934; also latest certified balance sheet and certified operating statements of the business, *** covering the past few years." The letter continued that in view of what was said Skewes would like to have a "Certified comparative operating statement" of the newspaper and job departments for the past 2 calendar years and for the 7 months of the current year; certified balance sheet as of July 31, 1936; break down of payments made to July 31 of interest and principal on the mortgage indebtedness; the assessed valuation and annual taxes paid; and further requested "Advertising production cost as well as selling price, per inch, for the last two calendar years and the first seven months of this year." That he would be grateful if they would mail the information to him so as to reach him in Los Angeles before August 18. The letter continued saying that as Layman

newspaper plant in Washington and located the plant. After this meeting, I received a letter to my home in July 1954, stating that they had arranged to analyze the figures submitted at the meeting by [redacted] and [redacted]. We feel that the volume of business, as well as the value of building and equipment seem to justify further investigation. Hence, despite the somewhat negative nature of the field, as well as the apparent paucity of profits, we are very frankly interested in the prospects. Just when we returned from California about September 1st, 1954, the [redacted] and [redacted] your principal [redacted] will be in Chicago, and submit a definite proposition; that any proposal would naturally be based upon the building and equipment in the region of [redacted] and [redacted] submitted by the [redacted] company of [redacted] and [redacted] of November 1, 1954; also a statement of a statement in the [redacted] net value of \$250,000, by the same [redacted] company, under date of October 6, 1954; also a letter of [redacted] and [redacted] certified operating statements of the business, [redacted] and [redacted] the latter contained that in view of [redacted] said [redacted] would like to give a [redacted] comparative operating statement" of the newspaper and job [redacted] for the past [redacted] calendar years and for the 7 months of the current year; certified balance sheet as of July 31, 1954; break down of [redacted] made to July 31 of interest and dividend on the [redacted] [redacted] the [redacted] and [redacted] taxes [redacted] and [redacted] [redacted] advertising proposition cost as well as [redacted] [redacted] for the last two calendar years and the first seven months of this year. That he would be [redacted] in the [redacted] all the information to him so as to reach him in the [redacted] before August 18. The letter continued saying that as [redacted]

knew, Skewes owned several newspaper properties and that he intended to put them under the management of Mr. Skinrood, who was an able newspaper man of some quarter of a century of metropolitan experience, and asked that a copy of the information requested, be sent to Mr. Skinrood, who lived in Milwaukee; that the information would be treated confidentially and "Mr. Skinrood will return the appraisals to you within the next few days;" that Mr. Skewes would endeavor to return the audit for 1935 and the operating statement for the first six months of 1936 within the next ten days.

Four days later, July 31, Layman replied to this letter addressing Mr. Skewes at Los Angeles, stating, "I have sent the owner of the paper [Slane] a copy of your letter, which he should receive in Miami, Florida, by the end of this week;" that Layman had given a favorable account to Mr. Slane of both Mr. Skewes and Skinrood, and continuing: "Today I received a letter from Mr. Skinrood, and the copies of the appraisal which I loaned to him. I suppose he has not finished with the copies of the audits, which I gave him, as he did not return them.

"We should be glad, of course, to give you any information which may be pertinent to the transaction under consideration. You should understand, however, that the principal thing we have to offer is a plant and an 'opportunity.' You will not purchase the property on a basis of its recent earning record, for, frankly, the property is not for sale on such a basis. The value of the property is found in the field itself, and in the possible development of which the field is capable." The letter concludes by stating that he enclosed a copy of a letter which he (Layman) had written to Mr. Skinrood in reply to Mr. Skinrood's letter of July 30.

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know, have owned several newspapers, including the Miami Herald, and intended to put them under the management of Mr. Skinnood, who was an able newspaper man of some quarter of a century of newspaper experience, and asked him a copy of the information requested, he sent to Mr. Skinnood, who lives in Miami; that the information could be treated confidentially as Mr. Skinnood will return the appropriate to you within the next few days; that Mr. Skinnood would endeavor to return the letter for you the operating statement for the first six months of 1935 within the next ten days.

Four days later, July 31, Layman replied to this letter addressing Mr. Skinnood at Los Angeles, stating, "I have sent the owner of the paper [Miami Herald] a copy of your letter, which he should receive in Miami, Florida, by the end of this week; that Layman had given a favorable account to Mr. Skinnood of both Mr. Skinnood and Skinnood, and continuing: "Today I received a letter from Mr. Skinnood, and the copies of the documents which I showed to him. I suppose he has not finished with the copies of the documents which I gave him, as he did not return them."

"We should be glad, of course, to give you any information which may be pertinent to the transaction under consideration. You should understand, however, that the Miami Herald we have to offer is a plant and an opportunity. You will not purchase the property on a basis of its present value, but, frankly, the property is not for sale on such a basis. The value of the property is found in the fact itself, and the possible development of which the field is capable. The latter concludes by stating that he enclosed a copy of a letter which he (Layman) had written to Mr. Skinnood in reply to Mr. Skinnood's letter of July 22.

July 30, 1936, Mr. Skinrood wrote Mr. Layman: "I am returning herewith by parcel post the two volumes on valuations of the Evanston property that we investigated recently;" and thanked Layman and the employees of the newspaper for the courtesies shown him on the recent visit to the plant. "Your frankness and your willingness to give us all the facts so far as they could be ascertained provide exactly the basis on which a business deal can be negotiated. We would not buy this or any other property without the most careful investigation and it is a pleasure to deal with parties who give every evidence of fair and above board practices and standards.

"We are interested in buying the Index and propose to make an offer when the owner gets back to Chicago." The letter then refers to Mr. Skewes as a substantial business man and continues: "The profits of the Index now appear to be almost negligible and I feel certain that only the most careful and scrupulous attention to details of management by owners who are highly familiar with newspaper making, will suffice to turn your present gross into an appreciable net profit. In other words it is a lot easier to lose money in that field than to make it. ***

"I may have some more questions for you in a few days as there [are] some points that we are not quite clear on as yet."

On the trial plaintiffs called a certified public accountant who gave testimony analyzing the profit and loss statement for the first 6 months of 1936 and testified that it showed a net loss of \$121.86 instead of a net profit of \$10,256.26.

Complaining of the balance sheet submitted by Layman at the meeting July 23, 1936, in Chicago, counsel for plaintiffs say that Layman said the balance sheet reflected the condition of the business of the newspaper for the year ending December 31, 1935.

July 23, 1935, Mr. [redacted] [redacted]

returning [redacted] by [redacted] [redacted] [redacted]

of the [redacted] property that we investigated recently; [redacted]

thanked [redacted] and the employees of the [redacted] for the [redacted]

coast shown him on the recent visit to the [redacted] [redacted]

ness and your willingness to give as all the [redacted] [redacted]

they could be ascertained provide exactly the [redacted] on which

business deal can be negotiated, [redacted] [redacted] [redacted]

other property without the most careful investigation [redacted] [redacted]

a pleasure to deal with parties who give every evidence of fair

and above board practices and standards.

"We are interested in paying the [redacted] [redacted] [redacted]

make an offer when the owner gets back to Chicago, [redacted] [redacted]

then refers to Mr. [redacted] as a substantial business man and con-

tinues: "The profits of the [redacted] now appear to be almost negli-

gible and I feel certain that only the most careful and thorough

attention to details of management by [redacted] [redacted] [redacted]

lar with newspaper making, will suffice to [redacted] your present

gross into an appreciable net profit. In other words it is

not easier to lose money in that field than to make it."

"I may have some more questions for you in a few days."

There [redacted] some points that [redacted] [redacted] [redacted]

On the trial [redacted] called a certified public accountant

and who gave testimony analyzing the profit and loss statement

for the first 6 months of 1935 and testified that it showed a

net loss of \$21.55 instead of a net profit of \$17,000.

Complaint of the balance sheet submitted by [redacted] [redacted]

the meeting July 23, 1935, in Chicago, counsel for [redacted] [redacted]

that [redacted] said the balance sheet reflected the condition of the

business of the newspaper for the year ending December 31, 1935.

Plaintiffs called Mr. Mahone, a certified public accountant and Professor Himmelblau, of Northwestern University, who testified criticizing the make up of the balance sheet; that one item on the asset side of the balance sheet under the caption "Net Book Value, \$30,000" of the land "should not have been set up under the caption 'Net Book Value,' but should have been set up under the caption 'Cost as of the date of acquisition by the corporation.'" That the actual cost of the land was \$7,487.50, as shown by the private journal of the Lake Shore Index, which was written up by Layman to \$30,000, which Layman admitted. Professor Himmelblau testified that the item in the balance sheet entitled "Circulation Structure" as having a value of \$40,000 "should have been shown in the balance sheet at the cost of the circulation structure as of the date on which the Evanston News Index acquired the newspaper." That another falsity of the balance sheet was that it showed under the heading "Long Term Obligations," 6% Registered 20-year Debenture Notes, \$100,000. "Long Term Note (due 1945), \$50,000," and counsel say that "after Slane had purchased the newspaper in 1934, *** Layman made the entries above quoted on the private ledger of the Evanston News Index, to which ledger only Layman and Slane had access." That Skewes and Skinrood asked Layman at the meeting of July 23, 1936, what these two items meant and he told them they "represented money which Slane had invested in the corporation either as working capital, expense of operation or part of the purchase price, *** represent actual investment on the part of Mr. Slane." Counsel continuing say Layman testified under cross-examination that his recollection was that Slane had obtained an option to purchase the newspaper from the Dawes interests for \$125,000, and that Slane sold this option to the new corporation for \$100,000

and was paid the \$100,000, by delivery to him of the long term note for \$50,000 and \$50,000 of the Registered Debenture Notes. The argument is that the information furnished plaintiffs as to the value of the newspaper plant was false and fraudulent, having been greatly inflated, and that such facts were carefully concealed by Layman at the July 23, 1936 meeting when the matter of the purchase and sale was first discussed.

(4) As to the claimed "Circulation fraud":

Counsel for plaintiffs contend that for over a year prior to the blind advertisement of March 7, 1936, Slane had been building up a false belief in the public mind as to the circulation of the newspaper through his false statements to the Post Office Department and through a statement by him to "Standard Rate and Data" a trade publication of high standing and reliability in the newspaper world; that prior to January 25, 1936, Slane, in compliance with the postal requirements, sent to the Post Office Department an affidavit sworn to by him stating the average daily net paid circulation of the newspaper for the year ending December 31, 1935, to be 5396; that Skewes read this statement in the "Editor and Publisher"; that "Slane's 'ABC' books of the Evanston News Index, Inc., as the circulation books are called, *** show that the circulation of the newspaper for that year, instead of being 5396 was 3290;" that after April 1, 1936, Slane sent another standard trade publication a sworn statement stating the average daily net paid circulation of the paper for 6 months prior to April 1, 1936 was 6389; that Skewes read this statement in August, 1936, but that Slane's "ABC" books showed the circulation during that time was but 3416; that October 7, 1936, Slane swore to a statement which he sent to the United States Post Office Department stating that the average daily net

(4) As to the alleged "Education Trust":

[illegible]

paid circulation for the 6 months' period prior to September 30, 1936, was 5407, but Slane's "ABC" books showed the circulation to be 3299. That during the conference between plaintiffs and Slane at the Stevens Hotel in Chicago, Slane stated that the public affidavits as to the circulation should be increased 1,000. This was denied by Slane. The "ABC" books are personal books kept by the publisher.

Plaintiffs' counsel say they were defrauded because of such misrepresentations by defendants. On the other side, counsel for defendants say: "there appears to be a large flexibility amongst individual newspaper publishers as to what shall or shall not be included in counting net paid circulation and it is a practice of small newspapers to include in their post office statement (or so-called publisher's affidavit) newspapers that they mail out or distribute that have not been paid for, but which they expect will be, prepaid subscribers who have temporarily discontinued delivery of their newspaper and various other types of subscribers. Hence, the publisher of a small newspaper may honestly represent in a post office affidavit a larger figure of net paid circulation than that which would be conceded by the standards promulgated by Audit Bureau of Circulation." And counsel say this custom is sustained by the testimony of the witness Bradley, western manager of a publishers' representative agency, and by Slane's secretary, a newspaper woman of long experience.

(5) As to the rebate fraud claimed by plaintiffs:

The evidence shows that for some time prior to the sale defendants were paying rebates to two large advertisers who had businesses in Evanston and that Slane had represented at the meeting in September, 1936, that there were no rebates paid to advertisers. Slane denied making any such representation but on

the contrary testified he disclosed that rebates had been paid to the two Evanston advertisers.

Plaintiffs' evidence is that they discovered about November, 1936, a month after they bought the newspaper plant, that rebates were being paid to the two Evanston advertisers and the number of subscribers was not as they claim Slane represented but was much less. That the actual circulation figures were as above stated.

Although plaintiffs had discovered the claimed misrepresentations in November, 1936, they made no complaint to defendants, but on the contrary paid the \$25,000 note due January 15, 1937 and made monthly payments thereafter until July 1, 1938, a period of more than 20 months. In these circumstances we think they ought not now be permitted to say that on account of these two claimed misrepresentations they have the right, about 20 months after the discovery, to insist such misrepresentations authorize them to rescind the purchase of the newspaper plant. Campbell v. Fleming, 28 English Law Reports (1 A & E) 44; Taylor v. Short, 107 Mo. 384; Greenwood v. Fenn, 136 Ill. 146.

Counsel for defendants contend that "Having discovered two incidents of an alleged fraud and having elected to ratify and affirm the contract, the right to rescission is permanently waived and is not revived by subsequent discovery of another incident of the alleged fraud," citing the Campbell, Taylor and Greenwood cases, while on the other side counsel for plaintiffs' position is that "Where at the time of the sale the seller has made a number of false representations regarding different elements of the property sold, and the buyer learns of their falsity on varying dates, respectively, subsequent to the purchase, there can be no ratification by him of the fraudulent transaction until

the time when he has made his discovery of the falsity of every representation. Skewes and Skinrood could not ratify until they had full knowledge of ALL the fraud practiced upon them, which full knowledge they did not obtain until July 22, 1938, eleven days before they filed their complaint for rescission." In support of this counsel cite Pierce v. Wilson, 34 Ala. 596; Voorhees v. Campbell, 275 Ill. 292; Foston v. Swanson, 306 Ill. 518, and other authorities.

Upon a consideration of all the authorities cited on this question and upon further investigation, such as we had time to make, we are of opinion no hard and fast rule can be laid down that will fit all cases, but the facts in each case must be considered and the "rule of reason" applied. Standard Oil Co. of N. J. v. U. S., 221 U. S. 1; Comm. Building Corp. v. Hirschfield, 307 Ill. App. 533.

As stated, the master made specific findings that defendants were guilty of no fraud which induced plaintiffs to purchase the newspaper plant. It must be borne in mind that Mr. Skewes was a newspaper man of 25 years' experience and had had wide experience in other businesses, he testified: "I have been engaged in the newspaper business, directly or indirectly, for 25 or 30 years. Now I am connected, either as owner publisher, or otherwise, with a number of newspapers. There is the Meridian, Mississippi, Star, the Laurel, Mississippi Daily Leader, Crowell, Louisiana, Daily Signal, the Peru, Illinois Daily News Herald, and the Evanston, Illinois Daily News Index. *** I was managing editor of the Milwaukee Daily News from 1914 to 1917; publisher of the Danville, Illinois Press 1918 to 1922. I am editor and owner, at this time, of the Meridian Mississippi Star and have been since 1922. I am president of the Laurel, Mississippi

Daily Leader. I am a director of the Merchants and Farmers Bank of Meridian. I am a director also of the Mississippi Development Board and have been a director of the Mississippi Press Association, and am now director of the Southern Newspaper Publishers Association," and continuing, he designated other important positions he held. He testified further: "My experience has brought me in contact with every phase of the newspaper business and that includes accounting systems for newspapers in a layman's sense. I have hired and retained accountants and auditors. I have installed accounting systems. In addition to the newspapers I have mentioned, I have also bought and sold the Lincoln, Illinois Star, the Perry, Oklahoma Daily Journal, the Blytheville, Arkansas Courier, the Litchfield, Illinois News Herald, and the Danville, Illinois Morning Press. I have purchased a weekly newspaper in Chicago Heights. I sold it to a gentleman by the name of Spencer. In the purchase and sale of newspapers there have been repeated instances where I have had to examine book-keeping figures concerning those various organizations."

In discussing the rule of law applicable to a case where the witnesses appear before the master and his findings are approved by the chancellor we cited and discussed the authorities in Phillips v. WGN, 307 Ill. App. 1. We there cited and quoted from the case of Smuk v. Hryniewiecki, 369 Ill. 546, the latest case in which our Supreme court had then expressed an opinion on the question. In that case the court said: "Where the master's findings have been approved by the chancellor we are not justified in disturbing the findings unless they are manifestly against the weight of the evidence." We there [in the Phillips case] pointed out there were other cases holding this was not a correct statement of the law. In the instant case, upon a consideration

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of all the evidence we are of opinion whichever rule is applied, the decree which finds there was no fraud must be affirmed.

We might add, however, that all that was said and done by Layman and Slane in the negotiations and sale of the property is not to be approved but we are of opinion that the manner in which business has been conducted since the "time whereof the memory of man runs not to the contrary" the law applied to the facts in the instant case does not afford plaintiffs a remedy. Wemple State Bank v. Cont. Ill. Co., 279 Ill. App. 224.

Complaint is made to fees allowed to the master. The master's fees were taxed at \$8,067.80; \$4,000 of this had been paid during the hearing pursuant to an order entered on motion of defendant Lake Shore Index, Inc., and by agreement of all parties, December 16, 1939. The order recited that \$2,000 had been paid the master pursuant to an order May 9, 1939, and it was ordered that \$2,000 more be paid to him. After the report of the master was filed, June 12, 1940, the master filed his petition June 26, 1940, and prayed that allowance be made to him for services rendered. He reported he had taken 35,452 folios of oral and documentary evidence at 15 cents per folio, \$5,317.80, and that he had performed 400 hours of service, hearing, etc., for which he asked \$4,000, or a total of \$9,317.80. From this amount credit was given by him of \$4,000, leaving a claimed balance of \$5,317.80. The court reduced the \$4,000 request for the hearings, \$1250, allowed the master \$2750 for this item, and ordered that the total fees of the master be allowed for \$8067.80, leaving a balance which after crediting the \$4,000 is \$4,067.80.

Counsel for plaintiffs contend the fees allowed were excessive "because the Master had charged on a folio basis as well as a per diem basis for the same services, and that he had also

-17-

of all the evidence in the case of certain witnesses. The
 The decree which finds there was no fault on the part of
 the plaintiff, however, that it is the duty of the
 by laymen and there is no indication that the
 is not to be approved but as the court has found that
 which business has been conducted since the time of the
 memory of man runs not to the contrary, the court is of the
 fact in the instant case does not differ from the
People State Bank v. Gott, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000
 Complaint is made to the effect that the
 master's fees were taxed at \$1,000.00; and that the
 paid during the hearing pursuant to an order of the
 of defendant Lake Shore Bank, Inc., and by agreement of the
 parties, December 16, 1939. The order provided that the
 been paid the master's judgment to an order of the court
 ordered that \$2,000 more be paid to him, after the payment of the
 master was filed, June 14, 1940, the master filed his petition
 June 28, 1940, and prayed that judgment be made for him for the
 vices rendered. He reported he had taken out the balance of one
 and documentary evidence to the effect that he had paid
 that he had paid the balance of one hundred dollars, \$100.00,
 which he asked for a total of \$1,100.00. The court found
 credit was given by him of \$100.00, leaving a balance of
 \$1,000.00. The court reduced the balance to the sum of
 \$1,000.00, and the master was ordered to pay the balance of
 that the total fee of the master be allowed for \$1,000.00, less
 ing a balance which after crediting the \$1,000.00 paid, was
 Counsel for plaintiff contends that the balance should be
 excessive because the master had charged for his fees as well
 as a per diem basis for the same services, and that he is also

charged on a folio basis for two trade magazines, 'Editor and Publisher' and 'Standard Rate and Data,' of which only five pages were introduced in evidence." Counsel say "The Master has charged and the court has allowed him the fee of \$1000 based upon the finding of the court that both of said magazines of several hundred pages each were received in evidence." Just how the \$1000 was arrived at by counsel we are not advised. Counsel further contend that on the hearing before Judge Lupe who entered the final order allowing the master's fees, above referred to, on which there is a balance due of \$4,087.80, "no evidence was introduced by the master to support his fees" and that "The order entered by Judge Lupe expressly finds that the transcript of the proceedings had before him on the question of Master's fees contains 'no evidence' but only argument of counsel and remarks of the court." This argument is not borne out by the record. The record discloses that February 10, 1941, Judge Lupe entered an order which recited that, on motion of attorneys for Skewes and Skinrood to certify a transcript of proceedings had before the court June 25, 1940, "this court having examined said transcript and having heard argument of the respective counsel, finds that said transcript does not constitute a report of proceedings and contains no evidence but only argument of counsel and remarks of the court." And it was ordered that the motion to certify the transcript be denied. This order does not show that no evidence was heard June 25, 1940 when the court fixed the fees but merely recites that what was presented as a transcript of that proceeding contained no evidence but only argument of counsel and the remarks of the court, and apparently for this reason, the court refused to certify it. The objection to the master's fees cannot be sustained.

Two further points are made by counsel for plaintiffs, (1) that "A motion of a defendant for a rule upon the plaintiff to give security for costs must be made at the defendant's earliest opportunity after the suit has been filed," and (2) that the judge of the Superior court fixed the supersedeas bond at \$175,000 and was therefore guilty of an abuse of discretion. We are unable to see how either of these points is involved in the matter before us.

For the reasons stated, the decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

Two further points are made in connection with the
(1) that a motion of a judgment for relief from the judgment
to give security for costs must be made at the time of the
first opportunity after the writ has been filed, and (2) that
the judge of the Superior Court fixed the amount of costs at
\$125,000 and was then found guilty of an error of law.
We are unable to see how either of those points is involved in
the matter before us.
For the reasons stated, the order of the Superior Court
of Cook County is affirmed.

ORDER AFFIRMED.

McGraw, P. J., and McHugh, J., concur.

41495

STANLEY H. DOGGETT,
Appellee,

v.

NORTH AMERICAN LIFE INSURANCE
COMPANY OF CHICAGO, a corpora-
tion, E. S. ASHBROOK and W. O.
MORRIS,

Appellants.

78
APPEAL FROM SUPERIOR

COURT OF COOK COUNTY.

166
314 I.A. 193

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A petition for a writ of mandamus to compel North American Life Insurance Company of Chicago, its president, E. S. Ashbrook, and its secretary, W. O. Morris, to permit the petitioner, or his agents and attorneys, to inspect and examine the list of names of the stockholders of said corporation, the record of their addresses and the number of shares of stock held by them, and to make extracts therefrom. The case was tried by the court without a jury. A judgment order was entered awarding a writ of mandamus and assessing a penalty of \$288.33 against each of the respondents "for failure of the respondents to permit the petitioner to examine the record of shareholders for a proper purpose." Respondents appeal from the judgment order.

The petitioner, living in South Grange, New Jersey, in 1932 acquired, through inheritance, 1,150 shares of a total outstanding issue of 250,000 shares of the capital stock of respondent Insurance Company. The Insurance Company paid dividends continuously from 1917 to 1932, inclusive. When the depression came the company ceased to pay dividends.

A number of contentions are raised by respondents in support of their claim that the instant judgment order should be set aside. In our view of this appeal we need notice only one of the contentions raised. Respondents strenuously contended in the trial^{court}/that the petitioner, in seeking to inspect the list

WILLIAM H. DOUGLASS
Applicant

v.

NORTH AMERICAN LIFE INSURANCE
COMPANY OF NEW YORK, a corporation,
Respondent,
MORRIS,
Appellee.

IN SENATE

COURT OF NEW YORK

814418

MR. JUSTICE ROSENBERG delivered the opinion of the court.

A petition for a writ of mandamus to compel North American Life Insurance Company of New York, its directors, officers, and its secretary, to permit the petitioner, or his agents and attorneys, to inspect and examine the list of names of the stockholders of said corporation, the record of their addresses and the number of shares of stock held by them, and to make extracts therefrom. The case was tried by the court without a jury. A judgment and decree was entered awarding a writ of mandamus and directing the corporation of \$188.33 against each of the respondents "for failure of the respondents to permit the petitioner to examine the record of shareholders for a proper purpose." Respondents appeal from the judgment order.

The petitioner, living in South Orange, New Jersey, in 1932 acquired, through his wife, 1,170 shares of the outstanding issue of 250,000 shares of the capital stock of respondent Insurance Company. The Insurance Company was organized continuously from 1917 to 1932, inclusive, when the depression came the company ceased to pay dividends.

A number of contentions are raised by respondents in support of their claim that the instant judgment order should be set aside. In our view of this appeal we need notice only one of the contentions raised. Respondents strenuously contend in the trial court that the petitioner, in seeking to inspect the list

of stockholders, was not acting in good faith and for the purpose of protecting the stockholders' interests, but to annoy and harass the corporation and for purposes detrimental to the best interests of the stockholders and the company. Undoubtedly, certain evidence introduced by respondents tended to support this contention. The petitioner introduced evidence tending to prove that the purposes were proper. But respondents contend that the trial court erred in excluding important evidence offered by them that would tend to prove their theory of fact as to the motive behind the action of petitioner in seeking a list of stockholders. This contention is a meritorious one. It appears that George E. Tribble, a stockholder of respondent company, brought suit against the company, its officers and directors, in the Circuit court of Cook county, in which Tribble asked, inter alia, that the election of the then board of directors of the company be declared invalid, and that he be given the right to examine the books and records of the company. It further appears that less than sixty days after Tribble acquired considerable stock in the company he brought the suit in question. During the cross-examination of petitioner, Doggett, he admitted that he was acquainted with Tribble; that they had collaborated in the solicitation of proxies from stockholders in respondent Insurance Company; that Tribble had agreed to go along with the stockholders' committee, formed by petitioner, to bring about the election of directors in the company. He testified that "there is a community of purpose between myself and Mr. Tribble in connection with the affairs of the company. Our desires are exactly alike as stockholders." The following question was asked petitioner: "Mr. Rooney [attorney for respondents]: Have you any agreement with Mr. Tribble in the event you are successful as to who shall become officers of the company? * * * The Witness: I have discussed it with Mr. Tribble. Not being an insurance man, naturally, when you look to the possibilities of replacement you

have to be prepared to have the right men to do it, and I figure that he is qualified to help in that direction." He further testified that after he had read the complaint by Tribble against the Insurance Company he, Doggett, addressed a letter to certain stockholders of the company in which he called their attention to the Tribble suit, and that the said suit "sets up, among other matters, the past losses of the company." Counsel for respondents made the following offer of proof: "That in November, 1939, Russell Matthias, an attorney in the firm of Ekern & Meyers at 1 North LaSalle Street, Chicago, went to Springfield, Illinois, in behalf of George E. Tribble of Baltimore, Maryland; that while there Mr. Matthias examined the records, including the charters and by-laws and other data pertinent to the North American Life Insurance Company which were on file in the office of the Director of Insurance; that the information then obtained is now being used as a basis for a suit filed by said George E. Tribble against the North American Life Insurance Company, its officers and directors, which is now pending in the Circuit Court of Cook County as case No. 40 C 203; that the suit is seeking, among other things, to declare invalid the election of the present Board of Directors of said Company and to obtain the right to examine the books and records of said Company." Petitioner's objection to the offer was sustained. Counsel for respondents then made the following offer: "Now, I make a further offer of proof of the testimony of David J. Kadyk with the law firm of Lord, Bissell & Kadyk, 135 South LaSalle Street; that in the last week of December, 1939, Mr. Kadyk received a telephone call from Mr. Erwin A. Meyers of the firm of Ekern & Meyers, 1 North LaSalle Street, Chicago; that Mr. Meyers in that conversation stated he represented Mr. George E. Tribble of Baltimore, Maryland; that he would like to arrange a conference; and following that conversation, on December 29, 1939, Mr. Kadyk went to the office of Ekern & Meyers and there had a conference

have to be prepared to have the right to be heard in that connection. That he is entitled to a full and complete hearing in that connection is what the court said after he had read the complaint by which the Insurance Company was brought into the case to obtain stockholders of the company in which he claimed that attention to the Triolo suit, and that the said suit "sets up, among other matters, the past losses of the company." Counsel for respondents made the following offer of proof: "That in November, 1939, Matthew, an attorney in the firm of Jones & Jones at 1 North Laclede Street, Chicago, Illinois, in behalf of George A. Triolo of Baltimore, Maryland, and wife, Mary, who are now residing in Baltimore, Maryland, produced the records, including the minutes and other data pertinent to the North American Life Insurance Company which were on file in the office of the Director of Insurance; that the information then obtained is being used as a basis for a suit filed by said George A. Triolo against the American Life Insurance Company, its officers and directors, which is now pending in the Circuit Court of Baltimore City, Maryland, and that the suit is seeking, among other things, to invalidate the election of the present Board of Directors of said Company and to obtain the right to examine its books and records of said Company." The plaintiff's offer of proof was sustained. Counsel for respondents made the following offer of proof: "Now, I wish to offer of proof that in testimony of which I wish to call with the last of last, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 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3906, 3907, 3908, 3909, 3910, 3911, 3912, 3913, 3914, 3915, 3916, 3917, 3918, 3919, 3920, 3921, 3922, 3923, 3924, 3925, 3926, 3927, 3928, 3929, 3930, 3931, 3932, 3933, 3934, 3935, 3936, 3937,

with Mr. Meyers, Mr. Luther F. Binkley and Mr. Russell Matthias; that Mr. Meyers then informed him that his client, Mr. Tribble, was the owner of about thirty to forty thousand shares of stock of the North American Life Insurance Company, that he controlled at least another thirty thousand shares and had access to about seventy thousand more; that unless the officers of the Company would agree at once to double the Board of Directors or, in other words, to increase it from nine to eighteen, the additional members of which were to be selected by his client, Mr. Tribble, and also to give Mr. Tribble an important position as an officer, either as President or Chairman of the Board or some similar position, and allow Mr. Tribble to pick one-half of the members of all key committees of the Company, that a suit would be filed at once contesting the validity of the election of the entire Board of Directors and asking to examine books and records of the Company and for a list of stockholders and other relief; that Mr. Kadyk then informed the gentlemen that the officers suggested Mr. Tribble come to Chicago for a conference; that this suggestion was never acted upon and that within a very short time thereafter a suit was filed; that Mr. Kadyk of the firm of Lord, Bissell & Kadyk and myself are attorneys of record in the suit mentioned. Mr. Hanley [attorney for petitioner]: I object to that testimony as being incompetent, irrelevant, and immaterial. The Court: I think so, objection sustained."

The offered evidence would tend strongly to support respondents' theory of fact that the petitioner and Tribble were engaged in a common purpose, to obtain partial or complete control of the management of respondent company, and therefore the acts and declarations of one were the acts and declarations of the other. The instant proceedings were commenced in the Superior court of Cook county. Later, Tribble commenced proceedings against the respondents in the Circuit court of Cook county. Respondents

claim that the starting of the second suit was a part of the common plan to harass the respondents and to force them to accede to Tribble's demands. If the petitioner in the instant suit is bound by the acts and declarations of Tribble, in furtherance of the common purpose, and we hold that he is so bound, then, if the respondents proved to the satisfaction of the trial court the alleged facts set up in their offer, a writ of mandamus should not be awarded in the instant case. Respondents further contend that the court erred in refusing to allow them to offer proof to the effect that certain statements of alleged facts made by petitioner in certain circulars he sent to stockholders soliciting their proxies, were false. If petitioner made misrepresentations of fact in his circulars, respondents had the right to show that fact, as the misrepresentations would bear upon the question of petitioner's good faith in seeking to inspect the list of stockholders.

For the guidance of the trial court should there be another trial of the instant proceedings, we may state that we do not agree with respondents' contention that a shareholder of a domestic life insurance company has no right, either at common law or by statute, to a list of shareholders, and that for that reason respondents' motion to strike the second amended petition should have been sustained and the suit dismissed.

The judgment order of the Superior court of Cook county is reversed and the cause is remanded for a new trial.

JUDGMENT ORDER REVERSED AND CAUSE
REMANDED FOR NEW TRIAL.

Sullivan and Friend, JJ., concur.

claim that the statement of the respondent was a part of the common plan to induce the respondents to contribute to the fund. It was contended in the respondent's affidavit that the respondents of the fund, in the furtherance of the common purpose, had been induced to contribute to the fund. It was contended that the respondents should not be awarded in the instant case. Respondent further contended that the court could not award a judgment in favor of the respondents to the effect that certain statements of alleged facts made by petitioner in certain circumstances were false. Respondent solicited their promise, were false. If petitioner made misrepresentations of fact in the circumstances, respondents had the right to show that fact, as the misrepresentation would bear upon the question of petitioner's fault in seeking to inspect the list of stockholders.

For the guidance of the trial court, it was shown that the trial of the instant proceedings, as far as the respondents were concerned, was conducted in a manner which was not consistent with respondents' contention that the respondents of the fund, in the furtherance of the common purpose, had been induced to contribute to the fund. It was contended in the respondent's affidavit that the respondents of the fund, in the furtherance of the common purpose, had been induced to contribute to the fund. It was contended that the respondents should not be awarded in the instant case. Respondent further contended that the court could not award a judgment in favor of the respondents to the effect that certain statements of alleged facts made by petitioner in certain circumstances were false. Respondent solicited their promise, were false. If petitioner made misrepresentations of fact in the circumstances, respondents had the right to show that fact, as the misrepresentation would bear upon the question of petitioner's fault in seeking to inspect the list of stockholders.

The judgment of the superior court of the county of ... is reversed and the cause is remanded for a new trial.

Sullivan and Brennan, J.J., concur.

41532

NATIONAL BRANDS STORES, INC.,
a corporation,

Appellant,

v.

H. J. ANDRESEN and GENOVEVA
ANDRESEN,

Appellees.

79
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

314 I.A. 194

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A first class action in the Municipal court of Chicago. The cause was tried by the court without a jury, the issues were found against plaintiff, and it appeals from a judgment entered upon the finding.

We may state at the outset that defendants' complaint that plaintiff filed a very incomplete abstract is a meritorious one.

The original statement of claim, filed on October 17, 1939, alleged that plaintiff on July 7, 1938, delivered certain fixtures and equipment to defendants under a conditional sales contract whereby defendants agreed to pay therefor the sum of \$3,478.18 in thirty-six equal monthly installments, after crediting the down payment, beginning with the month of July, 1938, and continuing monthly thereafter until the total amount was paid. The statement of claim states the fixtures and equipment delivered to defendants under the contract; it also states: "That the buyers, ~~Stocks and buyers~~ defendants herein, failed and neglected to make the payments provided in said conditional sales contract, but have been making payments of a lesser amount than the amount specified in the contract to be paid each month; that the total payment made to date on account of said contract amount to \$928.78; that under the terms of said conditional sales contract the defendants are now in arrears under the terms of said contract in the amount of \$2,549.40, and that the total

NATIONAL BRANDS STORES, INC.,
 a corporation,
 Appellant,
 v.
 H. J. ANDRESEN and GUNBOVNA
 ANDRESEN,
 Appellees.

APPEAL FROM DECISION OF THE COURT

COURT OF CHICAGO

812111118

MR. PRESIDING JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

A first class action in the Municipal Court of Chicago.
 The cause was tried by the court without a jury, the issues were
 found against plaintiff, and its appeals from a judgment entered
 upon the finding.

We may state at the outset that defendants' complaint
 that plaintiff filed a very incomplete abstract is a reprehensible
 one.

The original statement of claim, filed on October 17,
 1939, alleged that plaintiff on July 7, 1938, delivered certain
 fixtures and equipment to defendants under a conditional sales
 contract whereby defendants agreed to pay therefor the sum of
 \$3,478.18 in thirty-six equal monthly installments, after
 crediting the down payment, beginning with the month of July,
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 sales contract, but have been making payments of a lesser amount
 than the amount specified in the contract to be paid each month;
 that the total payment made to date on account of said contract
 amount to \$928.78; that under the terms of said conditional sales
 contract the defendants are now in arrears under the terms of
 said contract in the amount of \$2,549.40, and that the total

balance due on said contract amounts to \$2,549.40; that under the terms of said contract the entire balance has become and is now, by virtue of the failure of the defendants to make the payments promptly as provided in said contract, due and payable. Wherefore, plaintiff demands judgment against the defendants and each of them for the recovery of the possession of the said furniture and fixtures and that the amount of the payments made by the defendants to the plaintiff to date be forfeited by the defendants to the plaintiff as liquidated damages sustained by the plaintiff because of the failure of the defendants to comply with and fulfill the terms of the said conditional sales contract; plaintiff also demands judgment for its costs in this proceeding and for interest as by law provided." The statement of claim was verified by M. A. Smith, an employee of plaintiff. On November 15, 1939, plaintiff filed an amended statement of claim consisting of two counts. Count one sets forth what purports to be a written executed conditional sales contract dated July ____ 1938, which stipulates a purchase price of \$3,478.18; that \$984.51 had been paid by defendants. Count two alleges that in July, 1938, plaintiff and defendants entered into a written conditional sales contract covering fixtures and equipment installed in defendants' store; that before these fixtures were installed defendants ordered additional fixtures, and that thereupon a second written conditional sales contract was entered into by the parties; that thereafter defendants ordered additional fixtures and that all of the fixtures installed by plaintiff in defendants' store were included in a third and final sales contract entered into between plaintiff and defendants, which stipulated a purchase price of \$3,478.18; that this final contract has been lost by plaintiff; that if the court should find at the hearing that the existence of the final conditional sales contract was not established as a binding contract, that plaintiff is entitled to recover the fair market value of

the equipment and fixtures installed, amounting to \$4,672.36. Count two states the amount due to be \$4,672.36 less \$984.51 that had been paid by defendants. This amended statement of claim was verified by M. A. Smith. On February 9, 1940, plaintiff filed an amendment to the amended statement of claim. This amendment alleges that if the third and final written conditional sales contract set forth in haec verba in the amended statement of claim was not signed by plaintiff and defendants, it was a mere oversight on the part of plaintiff and defendants; that all of the terms of this contract were agreed upon by the parties as set forth in the amended statement of claim and constitute a written agreement between the parties as in the amended statement of claim set forth. This amendment was verified by R. E. Slaughter, secretary of plaintiff corporation. The trial commenced on May 21, 1940, before the Honorable John J. Rooney. After nearly all of the evidence had been heard plaintiff filed a further amendment to the amended statement of claim as amended. This last amendment states:

"(1) Plaintiff moves to strike from Count I of the amended statement of claim the claim based upon the lost conditional sales contract.

"(2) Plaintiff amends Count II of the amended statement of claim by striking from paragraph (3) and the concluding paragraph thereof the words 'fair market value' and 'full, true, and fair market value' and substituting in lieu of said words the following:

"costs to plaintiff of the property so delivered to the defendants, as aforesaid, plus brokerage; that the costs to plaintiff of said property on the date and dates of the delivery thereof amount to \$3,350.52; that the brokerage thereon amounts to \$201.00, and that the total amount due on account of costs to plaintiff, plus brokerage, amounts to \$3,551.52."

that the intent and purpose of this motion is to amend the second count of the amended complaint in order to base the complaint on the verbal contract between plaintiff and defendant, to-wit that

The equipment and fixtures installed, amounting to \$4,071.32. Count two states the amount due to it \$4,071.32 less \$1,000.00 that had been paid by defendant. This amended statement of claim was verified by J. W. Blalock, Jr. on February 2, 1940. Plaintiff filed an amendment to the amended statement of claim. This amendment alleges that in the third and third written conditional sales contract set forth in para 1 in the amended statement of claim was not signed by plaintiff and defendant, it was a mere oversight on the part of plaintiff and defendant; that all of the terms of this contract were agreed upon by the parties as set forth in the amended statement of claim and constitute a written agreement between the parties as in the amended statement of claim set forth. This amendment was verified by J. W. Blalock, Jr. secretary of plaintiff corporation. The trial commenced on May 31, 1940, before the Honorable John J. Rooney. After nearly all of the evidence had been heard plaintiff filed a further amendment to the amended statement of claim as amended. This last amendment states:

"(1) Plaintiff moves to strike from Count I of the amended statement of claim the claim based upon the last conditional sales contract,

"(2) Plaintiff amends Count II of the amended statement of claim by striking from paragraph (2) and the concluding paragraph thereof the words 'their market value' and 'full, true, and fair market value' and substituting in lieu of said words the following:

"costs to plaintiff of the property so delivered to the defendant, as aforesaid, plus brokerage; that the costs to plaintiff of said property on the date and date of the delivery thereof amount to \$3,750.00 and that the brokerage thereon amounts to \$201.00, and that the total amount due on account of costs to plaintiff, plus brokerage, amounts to \$3,951.00."

that the intent and purpose of this motion is to amend the second count of the amended complaint in order to base the complaint on the verbal contract between plaintiff and defendant, to wit that

defendant agreed to pay to plaintiff for the equipment installed the cost thereof to the plaintiff plus a brokerage."

By this last amendment plaintiff abandoned any claim upon the third and final written conditional sales contract set forth in haec verba in count one of its amended statement of claim. It also abandoned any claim for the fair market value of the fixtures alleged in count two of the first amended statement of claim.

Defendants' answer sets forth a single theory of fact, which defendants adhered to throughout the trial. The answer alleges that on September 28, 1938, defendants and plaintiff entered into a conditional sales contract wherein and whereby defendants contracted to purchase and plaintiff contracted to sell the following goods and chattels: (Here follows a list of the goods and chattels); that under the terms and conditions of the contract defendants were to pay for said goods and chattels \$2,269, of which \$263 was paid concurrently with the execution of the contract, and the balance of \$2,006 was to be paid in thirty-six equal successive monthly installments of \$55.73, on October 28, 1938, and the same day of each month thereafter until paid; that at the time of the execution of said contract any and all prior contracts, whether written or oral, were rescinded, cancelled, rendered void, and wholly merged into the said contract of September 28, 1938; that they have paid monthly to plaintiff under the said contract the installments of \$55.73 as provided in the contract, and that these payments were accepted by plaintiff. The answer further alleges that the two prior contracts between the parties that had been entered into before the contract dated September 28, 1938, was executed, were merged in the contract of September 28, 1938.

Plaintiff's final theory is "that it sold the furniture and fixtures in question to the defendants pursuant to a verbal

Defendant agreed to pay to Plaintiff the cost thereof to the Plaintiff's attorney. By this last amendment Plaintiff's attorney agreed upon the third and final written conditional sales contract set forth in page twenty in count one of the amended statement of claim. It also absconded with Plaintiff for the said contract value of the fixtures alleged in count two of the first amended statement of claim.

Defendants' answer sets forth a single theory of fact, which defendants agreed to throughout the trial. The answer alleges that on September 28, 1936, defendants and plaintiff entered into a conditional sales contract wherein and whereby defendants contracted to purchase and claimant contracted to sell the following goods and chattels: (1) the following of the goods and chattels; that under the terms and conditions of the contract defendants were to pay for said goods and chattels \$2,200, of which \$200 was paid contemporaneously with the execution of the contract, and the balance of \$2,000 was to be paid in thirty-six equal successive monthly installments of \$55.56, on October 28, 1936, and the same day of each month thereafter until paid; that at the time of the execution of said contract and all prior contracts, whether written or oral, were assigned, cancelled, rendered void, and wholly merged into the said contract of September 28, 1936; that they have paid monthly to claimant under the said contract the installments of \$55.56 as provided in the contract, and that these payments were accepted by claimant. The answer further alleges that the two prior contracts between the parties that had been entered into before the contract dated September 28, 1936, was executed, were merged in the contract of September 28, 1936.

Plaintiff's final theory is "that it sold the fixtures and fixtures in question to the defendant pursuant to a verbal

contract between plaintiff and defendants, which provided that plaintiff would sell and install said furniture and fixtures on the basis of the cost of the property to plaintiff, plus brokerage; that pursuant thereto plaintiff delivered and installed the equipment, and that it was contemplated by the parties that when delivery and installation of all the equipment had been completed a conditional sales contract would be entered into on the basis of said verbal contract, of cost plus brokerage; that no such conditional sales contract was ever entered into because defendants refused to sign the final one presented to them for signature, and that the only time there was a meeting of minds of the parties was in the said verbal contract; that none of the several forms of conditional sales contracts which were prepared, some of which were signed by defendants and none of which were ever signed by plaintiff, ever became a contract between the parties; that the defendants tried to take advantage of the plaintiff by refusing to sign a conditional sales contract for all the material after it had been installed and by selecting one of the several forms that had been prepared during the progress of the work and which contained only a part of the equipment, and attempting to adopt it as the final contract; that it would be unfair, unjust, inequitable and illegal for defendants to pay less than the cost to plaintiff of the said equipment, unless such an advantage over the plaintiff were obtained under a specific, mutually binding contract, entered into with plaintiff for a valuable consideration which was not the case. There never was such a contract, nor was there any consideration for such a contract."

Defendants contend: "1. The trial court properly found for the defendants, since the evidence established a valid contract between the plaintiff and the defendants under which the defendants

consideration for such a contract. The case. There never was such a contract, nor was there any consideration for a valuable consideration which was not obtained under a specific, unilaterally binding contract, material equipment, unless such an advantage over the plaintiff were defendants to pay less than the cost of installation of the which it would be unfair, unjust, inequitable and illegal for equipment, and attempting to adopt to the plaintiff's contract; progress of the work in which concerned only a part of the one of the several items that had been installed and by installing all the material after it had been installed and by installing plaintiff by refusing to sign a conditional sales contract of the parties; that the defendants tried to take advantage of the ever signed by plaintiff, even before a contract was made in the some of which were signed by defendants and none of which were several forms of conditional sales contracts which were signed of the parties was in the said verbal contract; and that the for signatures, and that the only time there was a signing of hands cause defendants refused to sign the final one because to them that no such conditional sales contract was ever made into the into on the basis of said verbal contract, of which the plaintiff had been completed a conditional sales contract and the defendants parties that when delivery and installation of the plaintiff's equipment was completed and that it was completed by the plaintiff; that defendant through plaintiff delivery, in two- on the basis of a deed of the property to plaintiff, this plaintiff could sell and install said equipment and plaintiff contract between plaintiff and defendant, which plaintiff

paid, and the plaintiff accepted and retained, the stipulated down payment, the defendants executed and delivered, and the plaintiff accepted and retained, a note providing for the payment of the balance of the purchase price in monthly installments, and the defendants are punctually paying, and plaintiff is accepting, the monthly installments in accordance with the note and contract.

2. The evidence not only does not sustain, but in fact negatives, plaintiff's claim that the contract between the parties for the sale of the fixtures and equipment fixes the price at plaintiff's cost plus brokerage."

Plaintiff is engaged, inter alia, in selling store equipment and fixtures. Defendants, husband and wife, owned and operated a grocery store at 1733 West 75th Place, Chicago. Plaintiff contends: (1) "The court erred in failing to find the issues for the plaintiff on the verbal contract entered into between the parties in January, 1938, because at that time and only at that time, was there a meeting of minds of the parties on all the terms of the agreement." (2) "The court erred in finding the issues for the defendants because defendants utterly failed to establish the existence of the sealed, written conditional sales contract, dated September 28, 1938, which they alleged as an affirmative defense." In support of plaintiff's contention that the only contract entered into between the parties was a verbal contract made in January, 1938, plaintiff depends upon the testimony of M. A. Smith, who testified that either late in January or early in February, 1938, he called on defendants with Harold Oakes, an employee of plaintiff, who "had contacted them previously," and during the course of a conversation he had with the defendants regarding the installation of the equipment Mr. Andresen ask him to give a price on certain items of equipment and that he stated to defendants that until it was determined what equipment would actually be required he

paid, and the plaintiff accepted and retained, the defendants accepted and retained, and the down payment, the defendants accepted and retained, and the plaintiff accepted and retained, a not providing for the payment of the balance of the purchase price in monthly installments, and the defendants are contractually paying, and plaintiff is receiving, the monthly installments in accordance with the note and contract. S. The evidence not only does not establish, but in fact negates, plaintiff's claim that the contract is for the purchase for the sale of the fixtures and equipment at the price of plaintiff's cost plus brokerage."

Plaintiff is engaged, under lease, in selling, leasing, and operating and repairing. Defendants, husband and wife, owned and operated a grocery store at 1933 West 7th Place, Chicago, Illinois. Plaintiff contends: (1) "The court erred in failing to find the balance for the plaintiff on the verbal contract entered into between the parties in January, 1938, because at that time and only at that time, was there a meeting of minds of the parties on all the terms of the agreement." (2) "The court erred in finding the balance for the defendants because defendants actually failed to establish the existence of the sealed, written conditional sales contract, dated September 28, 1938, which they alleged an affirmative defense." In support of plaintiff's contention that the only contract entered into between the parties was a verbal contract made in January, 1938, plaintiff's evidence upon the testimony of J. A. Smith, who testified that either late in January or early in February, 1938, he called on defendants with Harold Gekes, an employee of plaintiff, who "had contacted them previously," and during the course of a conversation he had with the defendants regarding the installation of the equipment, defendant ask him to give a price on certain items of equipment and that he stated to defendants that until it was determined what equipment would actually be required he

could not quote them a price, but that plaintiff would supply whatever equipment was required "at our cost plus our nominal National Brands brokerage fee;" that Andresen said that that was fair; that Andresen further said: "Any equipment necessary to go in there we will pay for your cost and your commission, is that right? A. Yes." Mr. Andresen denied that Smith or anyone connected with plaintiff made any proposal to defendants at any time based upon cost plus brokerage; that "I never heard a statement in regard to an agreement by me to pay on the basis of cost to the plaintiff, plus a brokerage commission. The first time I heard it was in this court room when Mr. Smith was on the stand. Prior to that time no demand had been made upon me by anyone representing the plaintiff, either by letter or by word of mouth, wherein it was stated that I owed for brokerage commission, installation and freight." During the examination of Mrs. Andresen she testified that she was present on various occasions when representatives of plaintiff came to their store or home in connection with the purchase of fixtures. The following then occurred: "Q. Now tell this Court whether or not at any conversation at which you were present, there was ever discussed a price to be charged to you and Mr. Andresen for all the fixtures, that would be based on what the National Brands might pay for the fixtures, plus a brokerage commission? A. Absolutely not. Mr. Quilici [attorney for defendants]: Take the witness. Mr. McKerchar [attorney for plaintiff]: No cross examination." It appears from the testimony of Smith that Harold Oakes, an employee of plaintiff, who "had contacted" the defendants, was present at the alleged conversation. It further appears that Oakes was present in court during the trial, but plaintiff did not call him as a witness. The failure to call Oakes creates an inference that Oakes' testimony if he had been called would not have corroborated Smith's version of the conversation. (See Pipal v. Grand Trunk Western Ry. Co., 341 Ill. 320,

327, and cases cited therein.) Defendants, for the purpose of emphasizing plaintiff's failure to call Oakes, introduced evidence to show that he had been present during the trial. In testing the credibility of Smith's statement as to the alleged conversation it is important to note that he verified the original statement of claim and the amended statement of claim. Plaintiff's final claim based upon the alleged conversation was clearly an afterthought, and the able and experienced trial judge was fully warranted in refusing to believe Smith's testimony as to the alleged conversation, especially in view of the shifty attitude of plaintiff in reference to its claim.

As to plaintiff's contention (2): We have before us what purports to be the written contract of September 28, 1938. Defendants contend that it was an executed written contract that merged all prior contracts and discussions. Plaintiff concedes that this contract, dated eight months after the alleged conversation, was drafted by M. A. Smith; that the contract was executed by defendants in duplicate; that Smith retained the original and left the carbon copy with defendants; that concurrently with the signing of the contract by defendants the down payment therein specified, \$263, was accepted by Smith, who turned it over to plaintiff; that a written receipt for the down payment in accordance with the contract was executed by Smith and delivered to defendants; and that monthly payments in the sums and at the times required by the contract have been duly and punctually paid by defendants and accepted and retained by plaintiff. At the time that defendants signed this contract Smith wrote out and handed to defendants the following receipt:

"9/28/38

"Recieved of H. J. Andresen ----- 263.00
as follows:

"\$200.00 P.O. money order
3.58 Reciepted bills
59.42 Cash

as down payment on equipment contract,

"National Brands Stores, Inc.
"M. A. Smith"

Plaintiff's contention, as we understand it, is that plaintiff never formally signed this contract. That Smith signed his name to the contract at the time in question is conceded, but plaintiff claims that his signature appears opposite the word "Witness," and it insists that he signed only as a witness. Plaintiff does not contend that Smith had not the authority to sign the contract. There was no necessity for Smith to sign the contract as a witness, for W. A. Holst, who had no connection with the parties, signed the contract as a witness. It appears from the evidence that Smith's purpose in procuring the new contract from defendants in lieu of the prior contract was that the finance company would not accept the other contract and that it was therefore necessary to make out a new form of contract. At the same time that the contract of September 28 was signed by defendants, Smith and Andresen signed their names to the list of the equipment, and this list was annexed to and made a part of the contract. It is clear that Smith did not sign this list as a witness. Plaintiff retained the original of this contract and accepted the down payment and the note, signed by defendants at Smith's request, for the balance due under the contract. Plaintiff thereafter accepted payments made by defendants in accordance with the contract for more than a year before it commenced the instant suit, and it was still accepting payments at the time of the trial. Plaintiff never tendered back to defendants their note, nor did it tender back the payments made by defendants under the contract. All the facts and circumstances show that this contract was a written one between plaintiff and defendants even though it was not formally signed by plaintiff. One who acts upon and accepts the benefit of what purports to be a written contract will be bound by that

as down payment on the contract.
"The balance of the contract
was paid by the defendant."

Plaintiff's contention, as we understand it, is that the defendant never formally signed this contract. That is, the defendant never signed the contract at the time it was made, but signed it afterwards. Plaintiff claims that the defendant signed the contract afterwards and it insists that it signed only as a witness. Plaintiff does not contend that the defendant signed the contract as a witness. There was no necessity for the defendant to sign the contract for V. A. Holst, who had no connection with the parties, signed the contract as a witness. It appears from the evidence that Plaintiff's purpose in procuring the new contract from defendant in lieu of the prior contract was that the defendant company would not accept the other contract and that it was necessary for the defendant to make out a new form of contract. At the same time that the contract of September 28 was signed by defendants, Smith and Anderson signed their names to the list of the equipment, and this list was annexed to and made a part of the contract. It is clear that Smith did not sign this list as a witness. Plaintiff retained the original of this contract and also the down payment and the note, signed by defendant as witness, received for the balance due under the contract. Plaintiff thereafter made payments made by defendant in accordance with the contract for more than a year before it commenced the lawsuit, and it was still not being payments at the time of the trial. Plaintiff never tendered back to defendant their note, nor did it tender back the payments made by defendant under the contract. All the facts and circumstances show that this contract was a written one between plaintiff and defendant even though it was not formally signed by plaintiff. One who signs a document and accepts the benefits of what purports to be a written contract, will be bound by that

contract even though he has not signed it. See Broderick v. Driscoll, 301 Ill. 174, 178; Bauer v. Jerolman, 124 Ill. App. 151, 155. Many other cases to the same effect might be cited if it were necessary.

Plaintiff argues that the printed word "Seal" appears after defendants' signatures to the contract and therefore the contract was not valid without proof that Smith had authority by an instrument under seal to enter into such a contract on plaintiff's behalf. This argument, under the facts and circumstances, does not merit serious consideration.

In this court plaintiff contends that "if the trial judge believed from the evidence that both parties had failed to establish by the required degree or certainty of proof, the contract which they were trying to establish, respectively, and if therefore in his opinion neither party had established the existence of an express contract, then the judge should have found the existence of an implied contract that defendants should pay to plaintiff whatever the court believed from the evidence the goods to be reasonably worth, and should have entered a judgment for plaintiff for that amount." It is sufficient to say in answer to this contention that the trial court was fully justified in finding that there was an express contract between the parties, viz., the written agreement of September 28, 1938. However, plaintiff will not be heard to urge this contention in this court, for it appears that after the trial had commenced plaintiff was allowed to strike from its statement of claim all allegations relating to, and prayers for the recovery of, reasonable value, and to substitute in lieu thereof a claim on an express verbal contract for cost plus brokerage. In such a state of the record plaintiff cannot now make a claim in this court for the reasonable value of the goods.

We have considered several supertechnical points raised

contract even though he has not signed it. See Woods v. ...
Woods v. ..., 301 Ill. 194, 178; Woods v. ..., 191 Ill. 191, 178. Many other cases to the same effect are cited in the
 at it was necessary.
 It is true that the contract was not signed by the
 after defendant's signature to the contract of the defendant's
 contract was not valid without proof that defendant had authorized
 by an instrument and a seal to make such a contract on
 Plaintiff's behalf. This argument, under the facts and circumstances, does not merit serious consideration.
 In this court Plaintiff contends that "if the trial
 judge believed from the evidence that both parties had failed to
 establish by the required degree of certainty of proof, the
 contract which they were trying to establish, respectively, and
 if therefore in his opinion neither party had established the
 existence of an express contract, then the issue should have
 been the existence of an implied contract. Plaintiff should
 pay to Plaintiff what was the value of the goods
 the goods to be reasonably valued, and a verdict should be entered in
 favor of Plaintiff for that amount." It is necessary to lay in
 answer to this contention that the trial court, in its judgment,
 tried in finding that there was an express contract, and that the
 parties, who, by written agreement of September 22, 1933,
 However, Plaintiff will not be heard to argue this contention in
 this court, for it appears that after the trial had commenced
 Plaintiff was allowed to strike from his statement of claim all
 allegations relating to, and requests for the recovery of, certain
 the value, and to substitute in his statement of claim an
 express verbal contract for goods plus brokerage. In such a state
 of the record Plaintiff cannot now make a claim in this court for
 the reasonable value of the goods.
 We have considered several superficial points raised

by plaintiff and find them without any real merit.

Plaintiff strenuously contends that if the judgment in this case is affirmed plaintiff will lose considerable money. A reading of the entire record convinces us that the instant claim was born of a desire to make defendants stand a loss that plaintiff claims it sustained in the transaction. Defendants, grocery storekeepers, in good faith entered into a written contract prepared by plaintiff. It is conceded that defendants have punctually met their obligations under the note and the contract. Plaintiff accepted and retained the written contract, the note, the down payment, and the monthly installments. The lack of merit in plaintiff's suit is accentuated by the frequent changes in its theory of fact.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

41542

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. CHARLES E. ELMORE,
Appellee,

v.

JAMES P. ALLMAN, Commissioner
of Police of the City of Chicago,
JOSEPH P. GEARY, WENDELL E.
GREEN and JOHN E. BRENNAN, Civil
Service Commissioners of the City
of Chicago, and ROBERT B. UPHAM,
Comptroller of the City of
Chicago,

Appellants.

80
168
APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

3141.A. 194²

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The relator, Charles E. Elmore, filed his petition for mandamus seeking his restoration as patrolman in the classified service of the department of police of the City of Chicago. Defendants filed their motion to strike the petition and to dismiss the suit. The trial court denied defendants' motion and ordered them to file their answer. After the answer was filed the relator moved to strike it as insufficient in law. The trial court sustained relator's motion and the defendants, electing to abide by their answer, the court entered judgment awarding the writ of mandamus, which commanded defendants to restore the relator to duty and to do all acts necessary and requisite to place relator on the roster and payroll of said City. The court reserved jurisdiction for the purpose of passing upon the relator's right to back salary. Defendants have appealed.

Defendants strenuously contend that the trial court erred in not holding that mandamus was not the proper remedy to review the action of the Civil Service Commission and in not sustaining defendants' motion to strike the petition for mandamus, and in not dismissing said petition. These contentions raise the question: Does mandamus lie to review the proceedings of the

ALIAS

PROSECUTOR OF THE STATE OF ILLINOIS
vs.
JAMES P. ALLEN, Defendant

v.

JAMES P. ALLEN, Commissioner
of Police of the City of Chicago,
JOSEPH F. GARY, Sheriff,
JOHN A. BROWN, Civil
Service Commissioner of the City
of Chicago, and ROBERT E. BROWN,
Comptroller of the City of
Chicago,
Appellants.

Appellants.

MR. PRESIDING JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

The relator, Charles E. Nimmo, filed his petition for

mandamus seeking his restoration as patrolman in the classified

service of the department of police of the City of Chicago.

Defendants filed their motion to strike the petition and to

dissolve the writ. The trial court denied defendants' motion

and ordered them to file their answer. After the answer was

filed the relator moved to strike it as insufficient in law.

The trial court sustained relator's motion and the defendants

objecting to abide by their answer, in order to obtain judgment

awarding the writ of mandamus, which contained statements to

restore the relator to duty and to do all acts necessary and

regulate to place relator on the roster and payroll of said

City. The court reserved jurisdiction for the purpose of hearing

upon the relator's right to back salary. Defendants have appealed.

Defendants strenuously contend that the trial court erred

in not holding that mandamus was not the proper remedy to review

the action of the Civil Service Commission and in not sustaining

defendants' motion to strike the petition for mandamus, and in

not dismissing said petition. These contentions raise the

question: Does mandamus lie to review the proceedings of the

Civil Service Commission or must this be done by certiorari alone? That question was squarely raised in People ex rel. Aeberly v. City of Chicago et al., 240 Ill. App. 208. There the First Division of this court, speaking through Mr. Justice McSurely, said (pp. 212, 213):

"Does mandamus lie to review the proceedings of the civil service commission, or must this be done by certiorari only? While, apparently, the writ of mandamus and certiorari have both been used for the same purpose, namely, to reinstate a party to an office from which he has been illegally removed or suspended, yet considering the history and purpose of the two actions with the reported decisions, we conclude that the writ of mandamus will not lie to review the proceedings of the civil service commission.

"The purpose of the writ of mandamus, when directed to subordinate tribunals exercising judicial or discretionary power, is to compel them to act, but never to compel them to decide in a particular manner. The writ is a command in the name of the State directed to some corporation, officer or inferior court, requiring the performance of a particular duty resulting from the official station of the party to whom the writ is directed. Mandamus lies to compel, not to revise or correct, action however erroneous it may have been. On the other hand, the office of the writ of certiorari is to review the proceedings in an inferior court to ascertain their validity. It is to bring up proceedings from the court below for examination so that they may be affirmed or quashed and not to enforce any rights growing out of those proceedings. Summarily stated, mandamus commands action and certiorari reviews an action. 13 Encyclopedia of Pleading and Practice, 'Mandamus'; High's Extraordinary Legal Remedies, 3rd ed., p. 4; 18 R. C. L., 'Mandamus,' p. 87; 5 R. C. L., 'Certiorari,' p. 250; 4 Encyclopedia of Pleading and Practice, 'Certiorari,' p. 10. By statute, the Supreme Court reviews the entire record in

cases brought by certiorari. Chapter 110, sec. 120, Illinois Statutes [Cahill's St. ch. 110, par. 119].

"Illinois decisions are not in conflict with this rule, although the precise question does not seem to have been raised, People ex rel. Qualey v. City of Chicago, 203 Ill. App. 192; People ex rel. Jones v. Webb, 256 Ill. 364; McArdle v. City of Chicago, 172 Ill. App. 142.

"In the cited cases of mandamus there was an allegation that the petitioner had been removed entirely contrary to law or without any hearing before the civil service commission or by a board not composed of civil service commissioners. It is conceded that the writ of mandamus will lie to restore a person who has been wrongfully ousted from office under no authority or color of authority and when he has a clear legal right to be reinstated."

There can be no contention in the instant case that the relator was wrongfully ousted from office under no authority or color of authority. Although there are several Appellate court cases that seem to run counter to the ruling in the Aeberly case, supra, we agree with the reasoning and conclusions of Mr. Justice McSurely in the latter case. The Supreme court cases cited by the relator, People v. Kipley, 171 Ill. 44; People v. Kraus, 171 Ill. 130, and People v. Kent, 300 Ill. 324, have no application to the instant question. However, in the view that we take of this appeal it is not necessary for us to decide the instant contentions, for the reason that the sole ground urged by the relator in support of the judgment order of the Circuit court, that "the charges filed before the Civil Service Commission against the plaintiff do not furnish sufficient grounds for his removal and do not constitute legal cause for removal within the meaning of Section 12 of the Civil Service Act," is without merit.

Defendants' answer contains a complete statement of the

cases brought by a plaintiff, the court has held that the

statutes [Section 11, ch. 110, par. 1111]

"Illinois decisions are not in conflict with this rule,

although the precise question does not seem to have been raised.

People ex rel. Jones v. City of Chicago, 200 Ill. 111, 69, 1904;

People ex rel. Jones v. City of Chicago, 200 Ill. 111, 69, 1904;

Chicago, 175 Ill. 111, 142.

"In the cited cases of mandamus there was no allegation

that the petitioner had been removed, or that he was

or without any hearing before the civil service commission or

by a board not composed of civil service commissioners. It is

conceded that the writ of mandamus will lie to restore a person

who has been wrongfully ousted from office under no authority

or color of authority and when he has a clear legal right to

be reinstated."

There can be no confusion in the instant case that the

relator was wrongfully ousted from office under no authority or

color of authority. Although there was a writ of habeas corpus

cases that seem to run counter to the ruling in the instant case,

nevertheless, we agree with the reasoning and conclusions of the majority

holding in the latter case. The Supreme court cases cited by

the relator, People v. Kipley, 171 Ill. 44; People v. Kipley, 171

Ill. 130, and People v. Kipley, 300 Ill. 324, have no relation to the

instant question. However, in the view that we take of this question

it is not necessary for us to decide the instant question, for

the reason that the sole ground urged by the relator for his

of the judgment order of the circuit court, that "the charges

filed before the Civil Service Commission against the plaintiff

do not furnish sufficient grounds for his removal and do not con-

stitute legal cause for removal within the meaning of Section 11

of the Civil Service Act," is without merit.

Defendants' answer contains a complete statement of the

record pertaining to the trial and discharge of the relator, and the relator's motion to strike the answer admits that the record as set up in the answer is correct. The record shows that on August 4, 1938, the relator received notice from the Civil Service Commission of the City of Chicago advising him that charges, a copy of which was served upon him, had been filed before the Civil Service Commission by the commissioner of police under Section 12 of the Civil Service Act relating to removals, and that the Commission had ordered that a hearing be had upon the charges in Room 612, City Hall, on August 10, 1938, at 10 o'clock a. m. The relator received the notice and a copy of the charges, and he attended the hearing before the Commission and was represented there by counsel. To quote from the record:

"DEPARTMENT OF POLICE

"Chicago, July 29th, 1938.

"To the Civil Service Commission
of the City of Chicago:

"I hereby make the following charges against Charles E. Elmore, Rank Patrolman, Department of Police of the Thirty Fifth (35th) District, in the classified service of the City of Chicago, and request that the same be investigated by the Civil Service Commission or by an officer or board appointed by said Commission, and that proper action be taken thereon, under Section 12 of the Civil Service Act and the rules of the Commission.

"CHARGES

"Violation of the following Sections of Rule 289, Rules and Regulations of the Department of Police, City of Chicago, promulgated and in force and effect January 22nd, 1934, viz:

record pertaining to the trial of the defendant of the murder of the late Mayor of Chicago, and the relation's action to strike the name of the defendant from the record as set up in the answer to the charges. The record shows that on August 4, 1938, the relation received notice from the Civil Service Commission of the City of Chicago advising him that charges, a copy of which was served upon him, had been filed before the Civil Service Commission by the Commissioner of Police under Section 12 of the Civil Service Act relating to removals, and that the Commission had ordered that a hearing be had upon the charges in Room 112, City Hall, on August 10, 1938, at 10 o'clock a. m. The relation received the notice and a copy of the charges, and he attended the hearing before the Commission and was represented there by counsel. To date from the record:

"DEPARTMENT OF POLICE"

"Chicago, July 1937, 1938."

"To the Civil Service Commission of the City of Chicago:

"I hereby make the following charges against Charles E. Elmore, Rank Patrolman, Department of Police of the City of Chicago, in the classified service of the City of Chicago, and request that the same be investigated by the Civil Service Commission or by an officer or board appointed by said Commission, and that proper action be taken thereon, under Section 12 of the Civil Service Act and the rules of the Commission."

"CHARGES"

"Violation of the following sections of the City of Chicago, and Regulations of the Department of Police, City of Chicago, promulgated and in force and effect January 2nd, 1934, viz:

"Section 3: Conduct unbecoming a police officer or employee of the Police Department.

"Section 33: Neglect to pay, within a reasonable time, a just indebtedness incurred while in the service.

"SPECIFICATIONS

"It is charged that Charles E. Elmore, Patrolman, assigned to the 35th District, in the Department of Police, City of Chicago, did incur indebtedness to

Frank J. Garvey	3451 W. 21st Street	\$225.00
Thomas J. Jordan	139 N. Clark Street	75.00
A. G. Meier & Co.	205 W. Monroe Street	20.00
Helen Busse	336 S. Illinois Street	
	Villa Park, Ill.	50.00
S. I. Frank & Sons	2412 W. North Avenue	30.00
Harry Garvey	3544 S. California Ave.	35.00
Mrs. Jennie Coleman	210 N. Keystone Ave.	?
Tower Finance Corp.	40 N. Dearborn St.	100.00

which he has failed to pay; that the said Patrolman Charles E. Elmore has no just or valid reason or excuse for his failure to pay said indebtedness, and has no meritorious defense against the claims made against him for the said indebtedness by

Frank J. Garvey
Thomas J. Jordan
A. G. Meier & Co.
Helen Busse
S. I. Frank & Sons
Harry Garvey
Mrs. Jennie Coleman
Tower Finance Corp.

that the said Patrolman Charles E. Elmore has persistently refused to pay his said indebtedness to the said

Frank J. Garvey
Thomas J. Jordan
A. G. Meier & Co.
Helen Busse
S. I. Frank & Sons
Harry Garvey
Mrs. Jennie Coleman
Tower Finance Corp.

and has by reason of his said refusal tended to impair his own efficiency in the discharge of his police duties, and has reflected discredit upon the honesty and integrity of all

"Section 3: Contained the names of the following:

employee of the Police Department,

"Section 4: Contained the names of the following:

a list of persons interested in the matter.

"P. 10: CONTAINS

"It is charged that Charles E. Blythe, a former

assigned to the 37th Precinct, in the Department of Police,

City of Chicago, did have the names of

Frank J. Garvey	4451 W. Lunt Street	100.00
Thomas J. Jordan	100 W. Clark Street	100.00
A. G. Meyer & Co.	200 W. Monroe Street	100.00
Melan Buss	330 E. Illinois Street	100.00
J. I. Frank & Sons	2412 W. North Avenue	100.00
Harry Garvey	1844 S. California Ave.	100.00
Mrs. Jennie Coleman	210 W. Myrtle Street	100.00
Tower Finance Corp.	44 N. Dearborn St.	100.00

which he has failed to pay; that the said Blythe

Blythe has no just or valid reason for a claim for his claim

pay said indebtedness, and has no intention of paying said

the claims made against him for the said indebtedness by

Frank J. Garvey
Thomas J. Jordan
A. G. Meyer & Co.
Melan Buss
J. I. Frank & Sons
Harry Garvey
Mrs. Jennie Coleman
Tower Finance Corp.

that the said Patrolman Charles E. Blythe has previously

refused to pay his said indebtedness to the said

Frank J. Garvey
Thomas J. Jordan
A. G. Meyer & Co.
Melan Buss
J. I. Frank & Sons
Harry Garvey
Mrs. Jennie Coleman
Tower Finance Corp.

and has by reason of his said refusal tended to impair his

efficiency in the discharge of his police duties, and has

reflected discredit upon the honesty and integrity of the

members of the Chicago Police Department, thus making it difficult and impossible for the members of the Chicago Police Department to obtain credit for the purchase of the merchandise necessary for the proper transaction of their business as police officers in the employ of the City of Chicago, and for the support and maintenance of their homes and families.

"WITNESSES

"NAME	"ADDRESS
Captain Thomas Harrison	35th District
Dept. Inspector Edwin J. Daly	1121 S. State Street
Frank J. Garvey	3451 W. 21st Street
Thomas J. Jordan	139 N. Clark Street
A. G. Meier & Co.	205 W. Monroe Street
Helen Busse	336 S. Illinois Street
	Villa Park, Ill.
S. I. Frank & Sons	2412 W. North Avenue
Harry Garvey	3544 S. California Avenue
Mrs. Jennie Coleman	210 N. Keystone Avenue
Tower Finance Corp.	40 N. Dearborn Street

"Respectfully submitted,

"(Signature)

"Thomas Harrison,

"Captain Commanding - 35th District.

"James P. Allman,

"Commissioner of Police.

"PTLM. Charles E. Elmore, 35th District

"The above officer has always had numerous complaints regarding non-payment of bills on file against him in this office. Due to the number of claims on file against him and his failure to make payment on same as agreed his suspension was recommended in January 1937. Ptlm. Elmore thereupon filed a petition in bankruptcy, No. 65040 thru his attorney Jacob Cohn, 228 N. LaSalle Street and scheduled approximately \$1500.00 in debts, the major part of which was made up of rent and cash loans.

"In June 1937, the Belmont-Central Currency Exchange, 3136 N. Central Ave., tel. Berk. 8140 filed complaint against Ptlm. Elmore regarding three checks which he had passed in three different currency exchanges of their company which were returned marked 'no account.' The checks were made out as follows:

"Check drawn on Main State Bank dated May 20th, 1937

tenance of their homes and families.
the employ of the City of Chicago, and for the support and main-
for the proper transaction of their business as police officers in
ment to obtain credit for the purchase of the merchandise necessary
gent and impossible for the members of the Chicago Police Depart-
members of the Chicago Police Department, thus making it diffi-

SECRET//

240 JGIM

EP 1611

Captain Thomas Harrison
 Dept. Inspector Edwin J. Daly
 Frank J. Garvey
 Thomas J. Jordan
 A. G. Meier & Co.
 Helen Busse
 S. I. Frank & Sons
 Harry Garvey
 Mrs. Jennie Coleman
 Tower Finance Corp.
 324 S. California Avenue
 312 S. Lexington Avenue
 40 S. Dearborn Street
 324 S. North Avenue
 312 S. Villa Park, Ill.
 230 S. Illinois Street
 207 W. Monroe Street
 139 S. Clark Street
 347 S. West Street
 111 S. State Street
 324 S. District

hottimuz vilitosqan"

(215879)

"Thomas Watson, no!"

"Captain Commanding - 35th District

1950.12.14 4 20037

"Communist Order of Officers"

MITCHELL, Charles H. Moore, 35th District

follows:

returned marked 'no account'. The checks were made out as three different currency exchanges of their company which were P.M. Elmore regarding these checks which he had passed in 3136 N. Central Ave., Tel. Berk. 8140 filed complaint against "In June 1937, the Belmont-Central Currency Exchange, the major part of which was made up of rent and cash loans, Laclelle Street and scheduled approximately \$1500.00 in debts, bankruptcy, No. 65040 thru his attorney Jacob John, 228 W. in January 1937. P.M. Elmore thereupon filed a petition in to make payment on same as agreed his supervisor was recommended One to the number of claims on file against him and his failure regarding non-payment of bills on file against him in this office.

"The above officer has always had numerous complaints re-

in favor of Charles Elmore for \$18.40. signed Francis M. Crane. Check returned 'no account'.

"Check drawn on Lake View Trust & Savings Bank, June 1st, 1937, in favor of Charles Elmore for \$16.55, signed Marvin R. Chase, also returned 'no account'.

"A third check for \$21.80 which Elmore cashed and which had been returned 'no account' was redeemed by Elmore before complaint was made.

"On March 9th, 1938, Freeman Bros., 2701 Lincoln Avenue, complained Elmore came into store and bought a bill of goods and cashed a check for \$11.60 on the Main State Bank which was returned 'no account', this check was cashed by Elmore on February 26th, 1938. Elmore promised to redeem same but failed to do so until complaint was made to this office. Mr. Freeman stated he received a cashier's check for \$11.60 from Elmore on March 17th or 18th, 1938, and returned check complained of to Elmore.

"Since Elmore filed his petition in bankruptcy in January 1937, claims totalling over \$600.00 have been filed in this office. He agreed to pay \$25.00 each payday on these claims but has failed to comply. On December 8th, 1937, he was suspended from duty for this failure and restored to duty on December 15th, 1937, upon his promise to pay \$25.00 each payday without fail and that no new debts would be incurred by him. A summary of Elmore's claims are as follows:

"Frank J. Garvey, 3451 W. 21st St., states that on July 15th, 1937, Elmore borrowed \$270.00 from him and gave a note due in six months on same. As no payment was made Garvey filed claim in this office on January 13th, 1938. Since that date Elmore has paid \$45.00 on same, leaving balance due of \$225.00.

"On Feb. 1st, 1938, Thomas J. Jordan, Atty., 139 N.

in favor of Charles L. ...
which returned no ...

"On March 28th, 1937, ...

1937, in favor of Charles L. ...

also returned no ...

"A third check for a ...

had been returned (no ...)

complaint was made.

"On March 28th, 1937, ...

complained Elmore ...

and cashed a check for \$11.00 on the ...

returned 'no account', this check was ...

February 20th, 1937. ...

to do so until complaint was made to this office. ...

stated he received a cash ...

March 17th or 18th, 1938, and a ...

Elmore.

"Since Elmore filed his ...

1937, claims totaling over \$500.00 have ...

office. He agreed to pay \$25.00 each ...

but has failed to comply. On December 28th, 1937, ...

from duty for this ...

1937, upon his promise to pay \$25.00 ...

that no new ...

claims are as follows:

"Frank J. Gervay, 1931 ...

1937, Elmore borrowed \$70.00 from ...

in six months or same. As no payment ...

in this office on January 15th, 1938. ...

Clark St. filed claim of \$75.00 against Elmore for services rendered in November 1935. Elmore stated Atty. Jordan was willing to wait for payment until some of his other claims were liquidated. No payment has been made on this claim.

"Jacob Cohn, Atty., 228 N. La Salle St., who filed petition in bankruptcy against Elmore filed claim in this office September 3rd, 1937, for services rendered Elmore for \$129.54 and costs as claim had to be reduced to a judgment due to Elmore's failure to make payment. This claim was finally paid in full on April 18th, 1938.

"On October 1st, 1937, Thomas Loome, 5616 S. Spaulding Ave., filed claim for \$85.00 against Elmore stating Elmore had obtained cash loan in that amount in August 1937 on the plea he would have to go to jail for a note he signed to Smith Bros. for paving of alley in rear of Elmore's mother's home. Elmore finally paid this claim in full on April 29th, 1938.

"On January 30th, 1938, Mrs. Moreth, 3055 N. Mason Ave., filed claim for \$40.00 against Elmore for cash loan made October 10th, 1937. This claim was finally liquidated on July 9th, 1938.

"On March 26th, 1937, A. G. Meier & Co., 205 W. Monroe St. filed claim for \$58.86 against Elmore for purchase made December 10th, 1936, upon which only \$5.00 had been paid since purchase. Balance due on this claim at present is \$20.00.

"In August 1937, Helen M. Busse, 336 S. Illinois St., filed claim for \$50.00 rent against Elmore, for month of August. Elmore finally moved from flat owing \$50.00 rent. No payment has been made on this claim as Elmore states claimant was willing to wait until some of his other debts were cleared up.

"On March 23rd, 1938, S. I. Frank & Sons, (furniture) filed claim of \$40.00 against Ptlm. Elmore. A total of \$10.00 has since been paid on claim leaving balance due of \$30.00.

claimant, filed claim of \$100.00 against Limore for \$100.00
received in November 1937. There is no entry against Limore
willing to wait for payment until 1938. This claim
was liquidated. No payment was made on this claim.
"March 1938, \$100.00, in full, was filed
petition in bankruptcy against Limore. This claim in this
office September 27, 1937, for services rendered Limore for
\$125.74 and costs as claimed to be reduced to a judgment
due to Limore's failure to make payment. This claim was
finally paid in full on April 1, 1938.
"On October 1st, 1937, Thomas Lee, John A. Williams
and, filed claim for \$87.00 against Limore stating Limore had
obtained cash loan in that amount in August 1937 on the plea
he would have to go to jail for a note he signed to Smith Bros.
for paying of alley in rear of Limore's property here, Limore
finally paid this claim in full on April 1, 1938.
"On January 30th, 1938, Mrs. Joseph H. Brown and
filed claim for \$40.00 against Limore for cash loan made October
10th, 1937. This claim was finally liquidated on July 8th, 1938.
"On March 26th, 1937, J. G. Baker and J. G. Limore
filed claim for \$78.00 against Limore for purchase and use of
10th, 1936, upon which only \$5.00 had been paid since purchase.
Balance due on this claim at present is \$73.00.
"In August 1937, John H. Brown, J. G. Limore and
filed claim for \$50.00 against Limore, for rent of house.
Limore finally moved from 1114 Oak Street, no payment
has been made on this claim as Limore stated claimant was willing
to wait until some of his other debts were cleared up.
"On March 23rd, 1938, C. I. Frank and Sons, (Kendall's)
filed claim of \$40.00 against Limore. A total of \$10.00
has since been paid on claim leaving balance due of \$30.00.

"In June 1938, Harry Garvey, 3544 S. California Ave., a brother of Frank J. Garvey, filed claim for \$35.00 against Elmore for cash loan made a year previous. On July 9th, 1938, Elmore came to this office and presented a currency check receipt #242080 for \$5.00 made out to Harry Garvey. On July 23rd, 1938, Harry Garvey stated this currency check was never received by him.

"On July 8th, 1938, Mrs. Jennie Coleman, 210 N. Keystone Ave., filed claim for \$80.00 representing June and July 1938 rent of a bungalow at 5730 Melrose St., occupied by Elmore. It is not known whether Elmore has made any subsequent payment.

"On July 22nd, 1938, Tower Finance Corp., 40 N. Dearborn St., filed claim for \$100.00 and interest against Elmore for cash loan made May 18th, 1938, upon which no payment had been made.

"Since January 1935, Elmore has been suspended from duty six times for failure to make payment as agreed on claims filed against him without result as he fails to remit the \$25.00 each payday with any degree of regularity and additional claims are continually being filed against him.

"C O P Y

"July 21, 1938.

"From: Department Inspector.

"To: Commissioner of Police.

"Subject: Ptlm. Charles Elmore, 35th District.
Charges against.

"The above named officer has a number of claims on file in this office upon which he has consistently failed to make payments as agreed. He was ordered to appear in this office each payday with \$25.00 to be disbursed to his various creditors but has failed to comply on numerous occasions and has advanced no valid reason for his failure.

"In this connection, would advise this officer filed a petition in bankruptcy several years ago scheduling over a thousand dollars in debts. After filing petition in bankruptcy claims which amount to about \$500.00 were received in this office, the major amounts being for cash loans.

"Due to the foregoing it is recommended that charges of failure to pay a just indebtedness and disobedience of orders be preferred against Ptlm. Elmore and referred to the Civil Service Commission.

"(Signed) Edwin J. Daly,
"Department Inspector."

The record then shows the following:

"IN THE MATTER OF CHARGES AGAINST CHARLES E. ELMORE:

"FINDINGS AND DECISION

"And now, the Civil Service Commission of the City of Chicago, having met in Room 612 City Hall, on the 10th day of August, 1938, for the purpose of investigating the foregoing charges, proceeded to hear and did hear testimony of the witnesses, a record of which is preserved and on file in the office of the Commission.

"And upon conclusion of all the evidence and argument, the Commission, being fully advised, finds that the following charges were filed against Charles E. Elmore in due form of law on the 2nd day of August 1938:

"Violation of the following sections of Rule 289, Rules and Regulations of the Department of Police, City of Chicago, promulgated and in force and effect January 22nd, 1934, viz:

"Section 3: Conduct unbecoming a police officer or employee of the Police Department.

"Section 33: Neglect to pay, within a reasonable time, a just indebtedness incurred while in the service.

"SPECIFICATIONS

"It is charged that Charles E. Elmore, Patrolman, assigned

-11-

to the 35th District, in the Department of Police, City of Chicago, did incur indebtedness to

Frank J. Garvey	3451 W. 21st St.	\$225.00
Thomas J. Jordan	139 N. Clark Street	75.00
A. G. Meier & Co.	205 W. Monroe Street	20.00
Helen Busse	336 S. Illinois St.	
	Villa Park, Ill.	50.00
S. I. Frank & Sons	2412 W. North Avenue	30.00
Harry Garvey	3544 S. California Ave.	35.00
Mrs. Jennie Coleman	210 N. Keystone Ave.	?
Tower Finance Corp.	40 N. Dearborn St.	100.00

which he has failed to pay; that the said Patrolman Charles E. Elmore has no just or valid reason or excuse for his failure to pay said indebtedness, and has no meritorious defense against the claims made against him for the said indebtedness by

Frank J. Garvey
Thomas J. Jordan
A. G. Meier & Co.
Helen Busse
S. I. Frank & Sons
Harry Garvey
Mrs. Jennie Coleman
Tower Finance Corp.

that the said Patrolman Charles E. Elmore has persistently refused to pay his said indebtedness to the said

Frank J. Garvey
Thomas J. Jordan
A. G. Meier & Co.
Helen Busse
S. I. Frank & Sons
Harry Garvey
Mrs. Jennie Coleman
Tower Finance Corp.,

and has by reason of his said refusal tended to impair his own efficiency in the discharge of his police duties, and has reflected discredit upon the honesty and integrity of all members of the Chicago Police Department, thus making it difficult and impossible for the members of the Chicago Police Department to obtain credit for the purchase of the merchandise necessary for the proper transaction of their business as police officers in the employ of the City of Chicago and for the support and maintenance of their homes and families.

to the 35th district, in the neighborhood of 1000, for or
Chicago, his home and business to

Frank J. Garvey	1000
Thomas J. Jordan	1000
A. G. Baker & Co.	1000
John House	1000
E. I. Frank & Sons	1000
Harry Garvey	1000
Mrs. Jennie Coleman	1000
Tower Finance Corp.	1000

which he has failed to pay; that the said William Garvey
imply has no just or valid reason or excuse for his failure to
pay said indebtedness, and has no justifiable defense against
the claims made against him for the said indebtedness by

Frank J. Garvey
Thomas J. Jordan
A. G. Baker & Co.
John House
E. I. Frank & Sons
Harry Garvey
Mrs. Jennie Coleman
Tower Finance Corp.

that the said William Garvey, imply has no just or valid reason or excuse
to pay his said indebtedness to the said

Frank J. Garvey
Thomas J. Jordan
A. G. Baker & Co.
John House
E. I. Frank & Sons
Harry Garvey
Mrs. Jennie Coleman
Tower Finance Corp.

and has by reason of his said refusal tended to injure his own
efficiency in the discharge of his public duties, and has refused to
discredit upon the honesty and integrity of all members of the
Chicago Police Department, thus making it difficult and impossible
for the members of the Chicago Police Department to obtain credit
for the purchase of the merchandise necessary for the proper
transaction of their business as police officers in the employ
of the City of Chicago and for the support and maintenance of
their homes and families.

"The Commission further finds that thereafter due notice was served upon the said Charles E. Elmore on the 4th day of August, 1938, by delivering a copy of said notice to the said Charles E. Elmore, which notice is in words and figures as follows:

"CIVIL SERVICE COMMISSION

"CITY OF CHICAGO

"CHICAGO, July 29th, 1938.

"TO: Charles E. Elmore (Patrolman)
"5730 W. Melrose Street

"Sir:

"You are hereby notified that charges(a copy of which is hereto attached) have been filed against you before the Civil Service Commission by the Commissioner of Police, under Section 12 of the Civil Service Act (Removals), and that the Commission has ordered that a hearing be had on said charges in Room 612 City Hall, on the 10th day of August, 1938, at 10 o'clock A. M., at which time and place you may appear and be heard in your defense, if you see fit.

"By Order Of The Commission:

"(Signed) J. S. Osborne,
"Secretary.

"The Commission further finds that together with said notice a copy of the foregoing charges was duly served upon the said Charles E. Elmore five days prior to this investigation; that the said Charles E. Elmore appeared in person at this hearing and was represented by counsel; that he and his counsel were present throughout and participated in the examination of witnesses; that all the witnesses were duly sworn, and testified.

"The Commission further finds that the said Charles E. Elmore on the 2nd day of August, 1938, was a Patrolman in the Department of Police of the City of Chicago.

"The Commission further finds that it has jurisdiction over the subject matter herein and of the person of the said

"The Commission further finds that together with said notice

was served upon the said Charles E. Limore, a copy of said notice to said
August, 1938, by delivering a copy of said notice to said
Charles E. Limore, which notice is in words and figures as follows:

"CIVIL SERVICE COMMISSION

"CITY OF CHICAGO

"THIS 10th day of August, 1938.

"TO: Charles E. Limore (Respondent)
"3330 N. Melrose Street

"SIR:

"You are hereby notified that charges (a copy of which is

hereto attached) have been filed against you before the Civil

Service Commission by the Commission of Police, under Section 10

of the Civil Service Act (Removals), and that the Commission has

ordered that a hearing be had on said charges in Room 512 City

Hall, on the 10th day of August, 1938, at 10 o'clock A. M., at

which time and place you may appear and be heard in your defense,

if you see fit.

"By Order of The Commission:

"(Signed) J. J. Labaree,
"Secretary."

"The Commission further finds that together with said notice

a copy of the foregoing charges was duly served upon the said

Charles E. Limore five days prior to this investigation; that

the said Charles E. Limore appeared in person at this hearing and

was represented by counsel; that he and his counsel were present

throughout and participated in the examination of witnesses; that

all the witnesses were duly sworn, and testified.

"The Commission further finds that the said Charles E.

Limore on the 2nd day of August, 1938, was a Patrolman in the

Department of Police of the City of Chicago.

"The Commission further finds that it has jurisdiction

over the subject matter herein and of the person of the said

Charles E. Elmore; and from a consideration of all the evidence before it, the Commission finds the said Charles E. Elmore guilty of the following:

"1. Conduct unbecoming a police officer;

"2. Neglect to pay within a reasonable time a just debt incurred while in the service.

"In that the Commission finds by a preponderance of all the evidence, that Charles E. Elmore was on the 10th day of August, 1938, and prior thereto from the 3rd day of January, 1930, a member of the police department of the City of Chicago, assigned on the 10th day of August, 1938, to the 35th District of said department;

"Since January, 1935, various claims have been filed with the Police Department against the respondent because the respondent has failed to pay debts incurred by him, which are just debts;

"The respondent was sent to the Department Inspector's office to adjust those claims. A budget was prepared in said office for the respondent and the respondent agreed to pay \$25.00 out of each pay check of \$100.00 to liquidate said indebtedness. This the respondent subsequently failed and refused to do.

"1. Claim of \$75.00 was filed against the respondent by Thomas J. Jordan, a just debt which the respondent refused to pay.

"2. A. G. Meier & Co. filed a claim of \$58.86, a just debt against the respondent, Dec. 10, 1936, and a balance of \$20.00 remains, which he has failed and refused to pay.

"3. Helen M. Busse, filed claim of \$50.00 for rent on flat, a just debt, which he refuses to pay.

"4. A claim of \$30.00 remains unpaid on a just claim

... and ...
...
...

1. ...

2. ...

... while in the service.

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... of this ...

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22. ...

23. ...

of \$40.00 made by S. I. Frank & Sons, which he refuses to pay.

"5. Harry Garvey made a just claim of \$35.00 against the respondent for a cash loan, and the respondent presented a currency receipt check to Inspector Daley of the Personnel Department saying he had sent \$5.00 to Harry Garvey, but in fact he did not send the \$5.00 check. That respondent made that statement to wilfully deceive the Department Inspector.

"6. That respondent owes Mrs. Jennie Coleman \$80.00 for 2 months house rent, which he refuses to pay, a just debt.

"7. That respondent owes \$100.00 to the Tower Finance Corp., a just debt, which he refuses to pay.

"That the respondent has been suspended six times from the service for failure to pay his honest debts. The periods are as follows: January 8, 1935, February 9, 1935, November 19, 1935, July 31, 1936, January 17, 1937 and December 8, 1937.

"That the failure of the respondent to pay these honest debts is due to dishonesty;

"That claims continuously flow into the Department for the respondent's failure to pay just debts;

"The respondent in June, 1937, gave three checks to the Belmont-Central Currency Exchange, for which he received cash, when the respondent had no funds in the banks, and well knew he had no account in the banks on which the checks were drawn;

"In June, 1937, the respondent drew a check on the Lakeview Trust and Savings Bank in favor of Charles Elmore for \$16.55, signed by Marvin R. Chase. Said check returned, 'No account.' The respondent redeemed a third check of like character for \$21.80, which was returned, 'No account.'

"The respondent did not attempt to explain these check episodes.

"On March 9th, 1938, the respondent bought merchandise from Freeman Brothers and cashed check for \$11.60, which was returned,

"On March 9th, 1938, the respondent bought a gold mine from
 Treeman Brothers and cashed check for \$11.00, which was returned,
 "The respondent did not attempt to explain these check
 was returned, 'No account.'
 gent redeemed a third check of like character for \$11.0, which
 by Marvin R. Chase. Said check returned, 'No account.' The respon-
 Trust and Savings Bank in favor of Charles Moore for \$15.75, signed
 "In June, 1937, the respondent drew a check on the Latvian
 had no account in the banks on which the checks were drawn;
 when the respondent had no funds in the banks, and will know in
 Belmont-Central Currency Exchange, for which he received cash,
 "The respondent in June, 1937, gave three checks to the
 respondent's failure to pay last debts;
 "That claims continuously flow into the Department for the
 debts is due to dishonesty;
 "That the failure of the respondent to pay these honest
 follows: January 8, 1937, February 2, 1937, November 19, 1937,
 July 31, 1936, January 17, 1937 and December 7, 1937.
 service for failure to pay his honest debts. The periods are as
 "That the respondent has been away six times from the
 a just debt, which he refuses to pay.
 "7. That respondent owes \$100.00 to the Tower Finance Corp.,
 months house rent, which he refuses to pay, a just debt.
 "8. That respondent owes Mrs. Jamie Coleman \$50.00 for a
 decisive the Department Inspector,
 \$5.00 check. That respondent made that statement so willfully
 he had sent \$5.00 to Harry Garvey, but in fact he did not send the
 receipt check to Inspector Juley of the Personnel Department saying
 respondent for a cash loan, and the respondent presented a check
 "9. Harry Garvey made a just claim of \$5.00 against the
 of \$40.00 made by S. I. Green & Sons, which he refused to pay.

'No account.' Respondent promised to redeem said check but has failed and refused to redeem it, until forced to do so by the Inspector of the Police Department;

"That said conduct is good cause for the removal of the respondent from his position;

"Therefore, by virtue of the findings of facts and guilt herein, it is here and now ordered, that the respondent, Charles E. Elmore, be and he is here and now discharged from his said position as a Patrolman in the Chicago Police Department and from the service of the City of Chicago.

"(Signed) Joseph P. Geary,
" " John E. Brennan,
" " Wendell E. Green,
" Civil Service Commissioners.

"Chicago, Illinois

"August 10, 1938

"Commissioners Joseph J. Geary,
"John E. Brennan,
"Wendell E. Green."

The counsel for relator concedes, as he must, "that the courts can only inquire whether the Civil Service Commission had jurisdiction and proceeded legally; that the court cannot substitute its discretion for, nor interfere with the discretion of the commission; that the court cannot weigh the evidence introduced before the commission and that the commission determines what is cause for removal. With these statements as general propositions of law, plaintiff here makes no particular objection." In support of the relator's contention that "the charges filed before the Civil Service Commission against the plaintiff do not furnish sufficient grounds for his removal and do not constitute legal cause for removal within the meaning of Section 12 of the City Civil Service Act," the able counsel for relator assumes that the sole charges made against the relator appear under the heading "Charges." The "Charges" and "Specifications," together, constitute the charges made against the relator.

What is the nature of the proceeding before the Civil Service Commission, and what is necessary to constitute a sufficient charge against the relator? In Joyce v. City of Chicago, 216 Ill. 466, the court said (pp. 471, 472): "This proceeding is not a common law or criminal proceeding, but an investigation. While the plaintiff in error had the right to have the charge preferred against him reduced to writing and in such form that he could clearly understand the ground assigned for his removal, it was not necessary that the charge should be formulated in technical language similar to that of a declaration or indictment. In State v. Common Council of the City of Superior, 90 Wis. 612, charges were filed with the common council against the mayor of the city for extorting sums of money from policemen and firemen for political purposes. After a hearing upon the charges the common council removed the mayor from office. Under the Wisconsin statute the mayor could not be so removed 'without cause, nor unless charges are preferred against him and an opportunity given him to be heard in his own defense.' The court, on page 622, said: 'This was not a common law trial, but an investigation. While the mayor had a right to insist that he have a fair hearing and that the substance of the rules governing trials at law should be preserved, he cannot require that the same precision and formality be observed which are required in criminal trials at law. These principles govern the charges made as well as the procedure. The charge does not need to be drawn with the accuracy of an indictment. It is sufficient if the accused be furnished with the substance of the charge against him.' Upon the trial the plaintiff in error was represented by counsel, and no objections, as appears from the record filed as a return, were made to the written charge, for indefiniteness or otherwise, and it is too late now for him

to raise the objection that the complaint was not sufficiently specific. In State v. Kirkwood, 15 Wash. 298, the relator was removed from the office of police commissioner of the city of Seattle by the mayor upon charges, and Kirkwood was appointed in his place. The relator brought suit in the form of an information in the nature of a quo warranto to oust Kirkwood. The court held that in a quo warranto proceeding it could examine the sufficiency of the charges, and said (p. 300): 'The second contention of appellant, however, viz., that the charges were sufficient to support the removal of relator, we think must be sustained. These charges may have been somewhat indefinite, but no motion was made to make them more definite or certain. No objection was made to them in any way. The appellant went to trial upon the complaint as it was and the issues were found against him, and we think it is too late for him now to raise the objection that the complaint was indefinite and not specific. * * * The complaint * * * is somewhat discursive and indefinite, but we think sufficient can be gathered from the complaint to place the relator upon trial for acts which were inconsistent with the duties of a public officer.'" The position of counsel for the relator is that "the plaintiff was not charged with or found guilty of neglect to pay a debt when he had the ability to do so."

All must agree that if a person owes a just debt and does not pay it because he is unable to pay it, he is not dishonest; but if he owes a just debt and refuses to pay it when he has the ability to pay it he is dishonest. The specifications in the instant case not only charged that the relator incurred indebtedness and failed to pay the same, but "that the said Patrolman Charles E. Elmore has no just or valid reason or excuse for his failure to pay said indebtedness;" that he "has persist-

11.02.06

Patrolman Charles E. Moore has no legal or valid reason or excuse for his failure to pay said indebtedness and that he "has promised" -

ently refused to pay his said indebtedness." The specifications apprised the relator that he was charged with being a dead-beat, and they charged "that the failure of the respondent to pay these honest debts is due to dishonesty." The specifications also charged that the relator cashed three checks with the Belmont-Central Currency Exchange which were returned "no account," and that he cashed a check with Freeman Bros. which was returned "no account." These charges as to cashing checks charged the relator with serious criminal acts. The specifications further charged him with lying to his superior officer and with deceiving the Commission. They further charged that the relator was suspended from duty six times for failure to make payments as agreed on claims filed against him, and that "additional claims are continually being filed against him." The specifications further charged that he filed a petition in bankruptcy and scheduled approximately \$1,500 in debts, the major part of which was made up of rent and cash loans. Other charges are contained in the specifications, but it is unnecessary to detail them. The claim of counsel for the relator that the charges filed before the Civil Service Commission against relator do not furnish sufficient grounds for his removal is without the slightest merit. The record of the Civil Service Commissioners shows that the relator was represented at the hearing by counsel, and there is nothing in the record to show that the point now made was raised before the Commission. We feel impelled to say that the counsel defending the relator must have been embarrassed by the number and the seriousness of the charges made. No point is made that the findings of the Civil Service Commission would not warrant the discharge of the relator. It would be a serious reflection upon the administration of justice if the courts of this county compelled the City of Chicago and the Civil Service Commissioners to reinstate the relator as a member of the police department

of the City of Chicago. We are impressed by the charge made by the commissioner of police to the Civil Service Commission that the relator "has reflected discredit upon the honesty and integrity of all members of the Chicago Police Department, thus making it difficult and impossible for the members of the Chicago Police Department to obtain credit for the purchase of the merchandise necessary for the proper transaction of their business as police officers in the employ of the City of Chicago, and for the support and maintenance of their homes and families." In this connection it must be noted that the pay of a police officer cannot be garnisheed, and it is therefore necessary for the police department to insist that its members act honestly in their dealings with others.

The judgment of the Circuit court of Cook county is reversed and the cause is remanded with directionsto the trial court to dismiss the petition for mandamus.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Sullivan and Friend, JJ., concur.

81
169
FROM MUNICIPAL

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APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

314 I.A. 195

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

October 15, 1940, plaintiff had judgment by confession against three defendants on a promissory note in the sum of \$466.50, \$67.37 of which represented attorneys' fees. Execution issued and was served on John Hinko, one of the defendants, November 13, 1940. Thereafter, November 19, 1940, he made a motion, supported by affidavit, that the judgment be opened, and was given leave to appear and defend. He filed his appearance and answer, and demanded trial by jury, and at the same time interposed a counterclaim against plaintiff. Plaintiff's motion to strike his answer and counterclaim were allowed, and the judgment previously entered was affirmed. Defendant John Hinko appeals.

It appears that in May, 1929, Nicholas and Katrzyna Sklar applied to plaintiff for a loan of \$500, which they needed for the purpose of making payments on some property owned by them. Being doubtful as to their financial responsibility, plaintiff indicated that he would make the loan if the Sklars could find a responsible party to sign a judgment note with them as comaker. Thereupon the Sklars went to plaintiff's home with John Hinko, and advised plaintiff that they were prepared to execute the note. The parties went to a real estate office, where the following note was made:

41728

D. BROWNE,  
Appellee,

v.

JOHN HINKO, Plaintiff,  
and KATHRYN HINKO,  
Appellants.

APPEAL OF JOHN HINKO.

MR. JUSTICE PRINCE delivered the following opinion:

October 12, 1940, plaintiff in error by a writ of habeas corpus

against three defendants on a writ of habeas corpus, execution  
\$460.00, \$07.37 of which was paid to the defendants, execution  
issued and was served on John Hinko, one of the defendants,

November 12, 1940. Thereafter, November 12, 1940, he made a  
motion, supported by affidavits, that the judgment be set aside  
and was given leave to appear and defend. He did this

and answer, and demand a trial by jury, and the same  
time interposed a counterclaim against plaintiff. Plaintiff's  
motion to strike his answer and counterclaim was allowed, and

the judgment previously entered was affirmed.

John Hinko appeals.

It appears that in May, 1932, Hinko and Kathryn

Hinko applied to plaintiff for a loan of \$100, which they

needed for the purpose of making payments on some property  
owned by them. Being doubtful as to their financial capac-

ability, plaintiff indicated that he would not loan it  
the Hinkos could find a responsible party to sign a

note with them as cosigner. Thereupon the Hinkos went to

plaintiff's home with John Hinko, and advised him that

that they were prepared to execute the note. The Hinkos

went to a real estate office, where the following note was made:

\*\$500.00

Chicago May 31st, 1929.

Ninety days after date, for value received, we promise to pay to the order of D. Sukowicz, Five Hundred and no/100 Dollars, at his home, with interest at 6 per cent. per annum after maturity until paid.

And to secure the payment of said amount we hereby authorize, irrevocably, any attorney of any Court of Record to appear for us in such Court, in term time or vacation, at any time after maturity and confess a judgment, without process, in favor of the holder of this Note, for such amount as may appear to be unpaid thereon, together with costs and reasonable attorney's fees, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that our said attorney may do by virtue hereof.

John Hinko  
No. 9316 Kimbark

Nicholas Sklar  
Katrzyzna Sklar"

The signatures of Nicholas and Katrzyzna Sklar appear in the lower right corner of the note, and Hinko's signature appears opposite their names in the lower left-hand corner. There is nothing on the face of the note indicating whether Hinko signed as maker or indorser, as he claims.

Although the note was payable, by its terms, 90 days after date, no payment was made thereon until December 8, 1930, when Sklar paid \$40 on account. No interest was then paid and plaintiff simply indorsed the receipt of \$40 on the back of the note as of December 8, 1930. Following this payment by Sklar, nothing was paid until May 26, 1937, almost eight years after date of the note, when Hinko, being threatened with suit, started to make payments thereon. Between that date and June 26, 1940, Hinko paid in excess of \$400 on account of principal. The judgment included the computation of interest at 6 per cent and

March 1, 1937, to the date of the note, 1937.

After maturity until paid.

And to secure the payment of the amount of money authorized, irrevocably, by the order of the bank, to appear for as in such court, in such time or times, at any time after maturity and before a judgment, without process, in favor of the holder of this note, for such amount as may appear to be unpaid thereon, together with costs and expenses, and to advise and release all persons who may intervene in any such proceedings, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that our said attorney may do by virtue hereof.

John Hinko  
No. 9316 Kinkor

Witness a Hand  
Kinkor

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and aggregated \$399.13, to which was added \$67.37 attorneys' fees, or a total of \$466.50, for which amount the judgment was entered.

Hinko's affidavit in support of the motion to open the judgment alleged that he signed the note as an indorser; that he was never indebted to plaintiff; that at the maturity of the note no demand was made on the Sklars for payment, nor any protest made for nonpayment, nor notice given affiant of the dishonor of the note; that in March, 1937, plaintiff asked affiant to pay the principal, and an agreement was then made that if affiant would pay "at his convenience, upon the principal of such note," plaintiff would waive all interest; and Hinko alleged that the remainder of the principal was thereafter paid by him. Hinko further alleged that plaintiff had breached his agreement, and by way of defense he charged that one Carl Hutton, who appeared in behalf of defendants by his cognovit and confessed there was due plaintiff \$466.50 on the note and agreed "that no appeal or writ of error should be prosecuted on the said judgment or any bill in equity filed to interfere with the same \*\*\*, " exceeded his authority and thus rendered the judgment null and void.

Hinko's counterclaim again set forth the circumstances under which the note was signed, claiming to have executed it as an indorser, and he alleged the oral agreement with plaintiff, by which he had undertaken to pay the balance of the principal on condition that plaintiff would waive the interest provided for in the note; and because of plaintiff's breach of this agreement, hesought to recover, by way of counterclaim, the sum of \$405.62, which he had paid on account of principal, together with interest thereon amounting to \$35, or an aggregate of \$440.62.

[illegible][illegible]

DETROIT 128W

he was never involved in anything; he was never involved in anything.

the note no interest was due on the \$100,000.00.

To find the value of the function, the value of the function is

the dishonor of the note; that in March, 1901, before it had been

Department of Home Science, University of Jammu, Jammu

of such note "of that form" and "that is", as you have to

by him. This further alleged that "Latent" had advised his

100-443887-100

Who are they, and why are they there?

Leased there was due \$1,000.00 on the note and amount

"That no appeal or writ of error shall be prosecuted on the

With a few and of solid things in life you go through life

the same \*\*\*', preceded the testimony and thus a material

birov was I am throughout

Linko's counterol in again set forth the circumstances

1. A further mark of genuine, long-term work ethic and

as an informant, and he also had the right to be heard.

litt, by which he had undertaken to pay the balance of the

principles on condition that

provided for in the note; and because of L. 144477's breach of

this agreement, brought to recovery, by way of compensation, this amount to you as, however, it should, therefore, this

the sum of \$407.62, which he had with on records of 1941-42.

together with interest thereon amounting to \$55, or an aggregate

It is urged that the cognovit attached to plaintiff's statement of claim exceeded the warrant of authority in that it provided "that no appeal or writ of error shall be prosecuted on the judgment or bill in equity filed to interfere with its operation," whereby the judgment was rendered void. While it may be conceded that the cognovit exceeded the warrant of attorney in the respect indicated, it does not appear that Hinko or the other defendants were prejudiced thereby. A similar situation was presented in Long v. Coffman, 230 Ill. App. 527, wherein it is held that a judgment by confession is not invalidated by the fact that the cognovit expressly released all errors in entering judgment, although the warrant of attorney in the note did not specifically authorize the attorney to release errors, since confession of judgment operates as a release of errors regardless of any such statement in the cognovit, and the rule of strict construction of the powers conferred by warrant does not apply, especially where no prejudice is shown. In First National Bank of New Paris, Ohio v. Royer, 273 Ill. App. 158, it was stated as a rule of law that where the cognovit, following a power granted in the warrant of attorney, expressly releases all errors, the effect is to waive or release all the errors in the proceedings, except such as affect the lack of jurisdiction to enter the judgment or the power under the warrant to confess the judgment.

The only defense sought to be interposed on the merits is that many years after the note became due, Hinko agreed to pay the balance of the principal on condition that plaintiff would waive the payment of interest, and Hinko's counsel contends that the question whether such an agreement was made should have been submitted to a jury. The note provided for payment of interest at 6 per cent, and whether Hinko be regarded as a maker or indorser, he was liable to pay both principal and interest according to the

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express provisions of the note in the event of default by the other two defendants. Since he was thus obligated, his promise to do what he was already bound to do furnished no valid consideration for plaintiff's alleged agreement to waive interest, and therefore Hinko was not entitled, as a matter of law, to have a jury pass on the existence of the alleged agreement.

The only other ground urged for reversal is that at maturity of the note, no demand was made on the Sklars for payment, no protest made for nonpayment, nor any notice given Hinko of the dishonor of the note. The note was payable, by its terms, at plaintiff's home. Since it was payable at a designated place, known to all the parties, no presentment for payment was necessary. Illinois Revised Statutes 1941, chap. 98, sec. 91.

It would follow from what has been said that Hinko is not entitled to recover on his counterclaim. Since he made payments on account of principal, we conceive no reason why he should be allowed to recover these payments with interest, and no authority is cited to support the contention made.

We find no convincing reason for reversal of the judgment of the Municipal court and it is, therefore, affirmed.

JUDGMENT AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

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JUDGMENT AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

41767

MILLIE STOKES,  
Appellee,

v.

C. A. HANSBERRY,  
Appellant.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

314 I.A. 195<sup>2</sup>

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT,

Millie Stokes occupied a three-room kitchenette apartment with her family as a tenant in an apartment building alleged to be owned and operated by defendant, C. A. Hansberry, at 4246 Indiana avenue, Chicago, under the name of "Hansberry Enterprises." She brought suit in tort against defendant for an alleged assault upon her by one Lambert, who accompanied M. C. Hall on January 30, 1936 while serving a distress warrant on her because of arrears in rent, alleging in the second count of her complaint that Hall and Lambert were Hansberry's agents and that the assault was committed while they were "engaged upon the defendant's business and acting in the scope of their authority." The jury returned a verdict in favor of plaintiff for \$300 and costs. The court overruled defendant's motion for a directed verdict at the close of plaintiff's case and again at the close of all the evidence, as well as motions non obstante veredicto, for a new trial, and in arrest of judgment and entered judgment on the verdict, from which defendant has taken an appeal.

Defendant interposed the threefold defenses that (1) the evidence does not support the charge that an assault was committed; (2) that if an assault was committed, plaintiff brought suit against the wrong party, since defendant was not owner of the premises on the day in question, having conveyed his title thereto to Mrs. Louise Washington, his sister-in-law, some four months before the alleged assault; and (3) that plaintiff cannot recover because she relied on the doctrine of respondeat superior but

1157

MILLIE STOKES  
Appellee,

v.

C. A. HANABERRY,  
Appellant.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO

3141A.195

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to Mrs. Louise Washington, his sister-in-law, some four months

before the alleged assault; and (3) that plaintiff cannot recover

because she relied on the doctrine of respondent superior but



failed to prove the relationship of master and servant between defendant and the process servers.

The essential facts disclose that Hansberry operated several apartment buildings or hotels on the south side in Chicago. One of these was the building in question, which consisted of twelve kitchenette apartments, one of which was occupied by plaintiff and her family. A sign on the building bore the name "Hansberry Enterprises." Mrs. Louise Washington, wife of defendant's half brother, was in the office of the building and claimed to be the owner thereof. She testified that Hall was a member of the "All State Special Police Organization" and served as a watchman and special officer to guard the building, and that she directed him to serve a distress warrant on defendant. Hall met Lambert, another member of the "All State Special Police Organization," at 48th street and Michigan avenue, and on his own initiative took him along to plaintiff's apartment in serving the warrant. Mrs. Stokes testified that these two men first came to her apartment January 26, which was four days before the alleged assault, knocked on her door, and when she opened it, advised her that they were police officers, that Mr. Hansberry had sent them up there, and they told her that if she did not move from the premises the next day they would put her out. They thereupon left her apartment and returned the following day, both wearing uniforms. When they knocked on the door plaintiff held the knob and told them that they could not come in, "that is the bailiff's work." One of the men said, "That makes no difference," and entered her apartment. She stated that one of the officers, presumably Lambert, dragged her to the hall, kicked her in the ankle and inflicted other injuries on her body. The jury was undoubtedly justified in finding that plaintiff had been assaulted, because two other witnesses corroborated her testimony. One of these was Lydia Currie, who was visiting her

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on her body. The jury was undoubtedly justified in finding that

plaintiff had been assaulted, because two other witnesses corroborated

her testimony. One of these was Lydia Currie, who was visiting her

son, who occupied another apartment in the building. She said that January 30, 1936, the day in question, she saw one of the men pass her apartment, and that she heard Mrs. Stokes say, "Oh, you hurt so." A doctor was called and plaintiff was ordered to bed. Mrs. Currie visited her daily thereafter while she was confined to her bed. Dr. D. H. Anderson, who attended her, testified that he had practised medicine for thirty-eight years and knew Mrs. Stokes and her family before the occurrence. He found Mrs. Stokes in a highly nervous condition, suffering from abrasions and contusions, and badly shaken up. These abrasions were located on the right shoulder, knee and ankle. He described them as severe at the time but did not consider them as permanent injuries. The patient was given some internal medicine, and bandages and dressings were applied to the injured parts. Thereafter he made eight or ten calls, dressed her wounds and gave her medication to relieve her pains. Lambert, who committed the assault, was absent from the city and did not appear as a witness at the trial. Hall denied that he had heard an altercation between Lambert and plaintiff, but Mrs. Washington testified that Hall came to the office, stating that Mrs. Stokes had "jumped" on some man, and asked her to call the police.

After the assault plaintiff requested her son to call the 48th Street Police Station. Policemen arrived in response to the call and asked either Hall or Lambert, "Did you hit that lady?" One of them replied, "I did not hit her." The police officer then propounded the same question to the other process server, who said, "Yes, Mr. Hansberry sent us up to put her out." The officers then took both process servers to the police station, and plaintiff testified that "They carried me there," and that Mr. Hansberry and Mr. Middleton were there. Police Lieutenant Middleton asked the process servers who sent them, and they

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replied, "Mr. Hansberry paid us." Middleton also asked Hansberry, "Why did you send those men to attack that young woman; why didn't you wait until her husband came in and talk with him?", to which he replied, "I told them to put her out, and not attack her."

It is urged by defendant that he was not the owner of the premises when the assault was committed, having conveyed title there- to to Mrs. Washington September 23, 1935, some four months prior to the assault. To sustain this contention defendant introduced in evi- dence a deed to Mrs. Washington, showing the conveyance. It was plaintiff's contention that this was a sham conveyance made by Hansberry in anticipation of a judgment that was entered against him in 1935. Mrs. Washington came to Chicago in 1934. She testified that she<sup>was</sup> at first employed as a clerk and later purchased the build- ing in question from Hansberry for \$18,000. She at first denied that she had bought other real estate from Hansberry but on cross-exami- nation, when confronted with another deed, she admitted the purchase of two other properties. Her testimony is so replete with contra- dictions that the jury was justified in concluding that she was not the owner of the premises in question. According to her testimony, she was to pay for the property at the rate of \$100 a month, to- gether with interest, and plaintiff's counsel says that on this basis it would take almost sixty years to complete the payments. When interrogated about the details of the transaction, Mrs. Washington could make no clear and comprehensive statement of the terms of the sale. Moreover, there is undisputed evidence that in March 1936, some two months after the assault, Hansberry collected rent from Mrs. Stokes and gave her a signed receipt therefor. The sign "Hansberry Enterprises" remained on the building after the alleged transfer, and so far as the record discloses is still there. Dr. Anderson testified that he saw the name on the building when he called to attend plaintiff, and there is substantial evidence of the fact that Hansberry exercised authority over Mrs. Washington,

replied, "Mr. Hansberry said to me, 'I had better not talk to you any more, why didn't you wait until her husband came in and talk with him?' to which he replied, 'I told them to get out of here, and not attack her.'"

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the building and tenants thereof after the assault.

Lastly it is urged that plaintiff cannot recover because she relied on the doctrine of respondeat superior but failed to prove the relationship of master and servant between Hansberry and the men who served the distress warrant on plaintiff. There is evidence that Hall, although a member of the All State Police, acted as a watchman for the building and was used by Hansberry to serve notices on tenants. If Hansberry was the real owner of the premises, as the jury had the right to conclude from the evidence, and if ~~was~~ either he or Mrs. Washington ordered Hall to serve the distress warrant, there could be no doubt as to the relationship of master and servant between Hansberry and Hall. Hall had been in Hansberry's employ before the transfer and continued in the same capacity until after the assault was committed. Mrs. Stokes testified that when Hall and Lambert first called on January 26 they told her that Hansberry sent them and requested her to move. There is also plaintiff's evidence that January 30 Hansberry had placed a padlock on the back door of her apartment and nailed down the windows. Hansberry, of course, denied this evidence and testified that he was absent from the city January 30, but it was the province of the jury to determine the facts, notwithstanding the conflict in the evidence.

Defendant cites and relies on several decisions, including Niles v. Marshall Field & Co., 218 Ill. App. 142, as supporting the proposition that Hansberry had no control over Hall or Lambert, since both of them were employees of the All State Police and therefore he could not be liable for torts committed by either of them. As members of the All State Police they were merely special officers limited in their activities to guarding or protecting buildings or property (Revised Chicago Code of 1931, as amended, sec. 3743). In seeking to evict plaintiff, however, Hall was nevertheless Hansberry's agent, because he had been ordered to

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serve the warrant, either by Hansberry himself or Mrs. Washington whom the jury evidently believed to be his employee. Although Lambert was not assigned to the building, he accompanied Hall in the performance of Hall's duty, and defendant cannot relieve himself of liability by disclaiming Lambert's services. In Niles v. Marshall Field & Co., supra, upon which defendant relies, one Rolands was assigned as house detective to Marshall Field & Company's department store by the superintendent of police upon the recommendation of <sup>Maguire &</sup> White Detective Agency, which had a contract with Field's for general police work, and while acting in the capacity of house detective he assaulted and arrested a customer, wrongfully charging her with having stolen certain merchandise. She brought suit against Field's, and by way of defense it was contended that Rolands was not Field's servant and that his relationship to Field's at the time was not such as to make the doctrine of respondeat superior applicable. It was shown upon trial that Field's paid the agency for detective service in the store and that Rolands was employed by and paid by the detective agency; and upon these facts the court held that Maguire & White, and not Marshall Field & Company, controlled Rolands' acts and therefore he was not an employee of defendant, who neither hired nor had authority to fire him. In the case at bar Hall was hired by Hansberry, was subject to his direction and orders, and was, in fact, his agent.

In City of Chicago v. O'Malley, 196 Ill. 197, one Moriarity was engaged as a bridge tender for the municipality, and on his own initiative he employed one O'Brien as a helper. O'Brien was not employed by the city, but by Moriarity without authority from the city, and was paid personally by Moriarity and could be discharged at Moriarity's pleasure. Some boys stepped upon the sidewalk of the bridge while it was being turned and O'Brien, in chasing them

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relies, one Rolands was assigned as house detective to Marshall  
Field & Company's department store by the superintendent of  
police upon the recommendation of <sup>Magnire &</sup> White Detective Agency, which  
had a contract with Field's for general police work, and while  
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the bridge while it was being turned and O'Brien, in chasing them

off, caused injury to one of the boys, who brought suit against the city. One of the contentions advanced was that the city could not be held liable for O'Brien's tortious acts since the latter was not a servant of the city, but the court held that if the acts of both Moriarity and O'Brien contributed to the injury, the city could not avoid liability by showing that O'Brien was not its servant, and the judgment against the city was accordingly affirmed. We think this case is applicable to the proceedings at bar. Lambert was Hall's helper and their combined acts resulted in the assault on plaintiff. Defendant cannot exculpate himself from liability by contending that Lambert was not employed by him.

The evidence in the case is sharply conflicting, and the record is replete with contradictions and denials of many of the essential facts, but it was the province of the jury to consider all the evidence and determine the facts. No serious criticism is made of the trial. Although the record does not contain the instructions to the jury, we assume that the jury were properly charged with respect to the questions of law interposed as a defense. We find no convincing reason for reversing the judgment and it is, therefore, affirmed.

JUDGMENT AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

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JUDGMENT AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

41826

B. A. ECKHART MILLING COMPANY,  
a corporation,

Appellee,

v.

ILLINOIS DOUGHNUT & CAKE COMPANY,  
a corporation,

Appellant.

83  
APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

314 I.A. 1961

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

B. A. Eckhart Milling Company brought suit against defendant in the sum of \$229.50 for flour sold and delivered in December 1939. This sale and the delivery of the merchandise is not questioned and defendant concedes that it was indebted to plaintiff for the amount claimed. However, defendant filed a counterclaim for \$573.50 based upon the failure of plaintiff to deliver 200 barrels of flour at \$4.25 a barrel under an agreement alleged to have been made August 15, 1939, as a result of which it purchased the flour elsewhere at advanced prices. The cause was heard by the court without a jury, resulting in a finding in favor of plaintiff on its statement of claim and against defendant on its counterclaim and the entry of judgment against defendant in the sum of \$229.50, from which this appeal is taken.

Although the record embraces some 300 pages of evidence, the essential facts may be briefly summarized as follows: Nick Doxas was employed as salesman for plaintiff with authority to take orders for the sale of its manufactured products. August 15, 1939 he secured a written order from defendant for 200 barrels of flour at \$4.25 a barrel. This order was signed by Doxas on behalf of plaintiff and by Nick Thomas on behalf of defendant. There appeared on the written order the following:

ILLINOIS DOUGHNUT & CAKE COMPANY,  
a corporation,  
Appellant,  
v.  
Appellee,  
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a corporation,  
OF CHICAGO, ILLINOIS.

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defendant. There appeared on the written order the following:

"This contract constitutes the complete agreement between the parties hereto; and cannot be changed in any manner except in writing subscribed by Buyer and Seller or their duly authorized officers. (Conditions cont'd on the back hereof) This contract is subject to confirmation by the seller at CHICAGO, ILL." The last sentence is set out in boldface type and immediately precedes the signatures of the parties.

There is evidence that in conformity with the usual course of business the order was forwarded by Dexas to plaintiff's office in Chicago and August 15, 1939, and again August 16, plaintiff's representative notified defendant that it could not accept the order. Nick Thomas, defendant's president, admitted the revocation of the order by telephone. He testified that August 16 he received a call from plaintiff's manager. The price of flour had gone up somewhat immediately after the order had been taken. In that telephone conversation plaintiff's manager told Thomas he could not accept the price stipulated in the memorandum and wanted more money. "I told him it is a contract binding on both parties and I asked him to return it. When he told me the price had gone up I told him I don't care if the price had gone up, I said, 'Well, I want my flour.' Then he said ten cents more a barrel he wants. I said, 'I want my flour' and then I hung up on him." Thereafter defendant had conversations with Dexas and others over a period of time and finally, being unable to purchase the flour at \$4.25 a barrel, defendant obtained it elsewhere in small lots on different dates at advanced prices, and its counterclaim against plaintiff, alleging that the transaction of August 15, 1939 was an executed contract of sale which plaintiff had breached, is predicated on the damages resulting from those purchases at advanced prices.

The legal aspects of the case present little difficulty. The numerous cases cited by defendant are simply an application to sales transactions of the elementary law of offer and acceptance

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The legal aspects of the case present little difficulty. The numerous cases cited by defendant are simply an application to



found in the general law of contracts. The rule is well settled that where an order for goods or chattels is made subject to approval or acceptance, it merely constitutes an offer to contract which may be rejected by either side before it is accepted. In 55 C. J., at p. 81, the rule is set forth as follows: "An order for goods or chattels, until acceptance, is merely an offer or proposal to buy, particularly where the order is given to an agent of the seller and is made subject to the seller's approval or acceptance. It is merely an offer to contract and not a contract to sell or purchase." In the same volume, at p. 85, the author says that, "An order for goods or chattels given to an agent of the seller, subject to the latter's approval or acceptance, may be withdrawn or countermanded by the buyer at any time before it is accepted by the seller and such acceptance communicated to the buyer, even though the order provides that it cannot be countermanded either before or after acceptance," and in the same volume, at p. 90, we find the following: "A writing in the form of a contract of sale, entered into by one party and an agent of the other party, with the understanding or agreement that it is to be submitted to the agent's principal for approval or acceptance, is a mere offer to buy or sell, and does not constitute a complete contract of sale until it is so approved or accepted by the principal, and such approval or acceptance communicated to the other party to the writing, although a bill of sale of property to be taken in exchange accompanies the offer." Plaintiff cites numerous Illinois authorities supporting this rule; none is cited to the contrary. Abrahams v. Weiller, 87 Ill. 179; Greenhood v. Keator, 9 Ill. App. 183; Martin & Co. v. Wilms, 61 Ill. App. 108; Estate Stove Company v. Kenney et al., 234 Ill. App. 366; Alexander Hamilton Institute v. Jones, 234 Ill. App. 444; Stimpson Computing Scale Co. v. Ehmsen, 246 Ill. App. 271.

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The only fair conclusion to be drawn from the evidence is that Doxas was authorized to take orders but had no authority to consummate a sale. All orders taken by him were subject to confirmation by the seller, his principal. The evidence is likewise clear that he took the order in question and forwarded it to plaintiff's office. Defendant's president admits that on the 15th of August, the date the order bears, and again on August 16, plaintiff rejected the offer. Under these circumstances there could be no contract of sale and consequently no breach thereof.

Defendant does not question these fundamental rules of law, but invokes the doctrine of estoppel by reason of the fact that on prior occasions Doxas had taken orders from defendant which were delivered without confirmation. Its counsel cite cases to the effect that if a principal, by his conduct toward third parties, causes them to reasonably believe that a party is his agent and authorized to contract for him, he will be estopped from denying the agent's authority. We find no evidence that would justify the application of this doctrine to the circumstances of this case. The fact that prior orders had been taken by Doxas and filled merely indicates that they were confirmed by plaintiff, but would not deprive plaintiff of reserving to itself the right of rejecting subsequent sales. There is nothing to suggest that Thomas was unaware of the conditions of the agreement, which are set forth in boldface type immediately above his signature. He was evidently an alert business man, could read, speak and understand English, and is presumed to have been aware of the provision in the memorandum which made it subject to confirmation by plaintiff.

The case was fairly tried and there is no dispute as to the salient facts. Holding as we do that the contract was never approved, but was rejected by plaintiff, it becomes unnecessary to discuss the measure of damages for which defendant contends under its counter-claim. Judgment of the Municipal court is, therefore, affirmed.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

The only fair conclusion is that the contract was not approved by the court. It is not necessary to discuss the measure of damages for which defendant contends under the contract. Judgment of the United States court is, therefore, affirmed.

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There is nothing to suggest that Thomas was a member of the condition of the agreement, which was not within his knowledge. It is likely above his signature. He was evidently an agent for the business and could read, speak and understand English, and is presumed to have been aware of the provision in the deed which was subject to confirmation by plaintiff.

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41899

KLING-TITE PAINT PRODUCTS CO.,  
a corporation,

Appellee,

v.

COLUMBIA ICE & ICE CREAM COMPANY,  
a corporation,

Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

314 I.A. 197

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover \$1,031.21, being the agreed purchase price for certain roofing material sold by it to defendant. After filing its affidavit of defense, defendant interposed a counterclaim for damages. The cause was heard by the court without a jury, resulting in a finding and judgment in favor of plaintiff for \$800 and against defendant upon its counterclaim, from which defendant appeals.

Briefly summarized, the facts disclose that defendant was in the business of manufacturing ice and ice cream in its plant at 1013 South Kedzie avenue, Chicago. Part of the plant was covered with a so-called spray deck or roof, which was designed to cool the roof by means of a continual spray of water thereon. Plaintiff was in the business of selling roofing materials and paints and had been so engaged for a number of years. In March or April 1939 J. O. Hummell, a sales representative of plaintiff, called at defendant's plant for the purpose of selling defendant certain roofing material. He entered into negotiations with Dan Egan, defendant's general manager, which culminated in the sale of the roofing material on which this suit is predicated. Defendant makes no denial of the purchase and concedes that if it is liable for plaintiff's claim, judgment in the sum of \$1,031.21 would have been warranted. Nevertheless, the court, for some reason which does not appear of record, awarded plaintiff the reduced sum of \$800.

Although the evidence is conflicting as to some of the

KING-TYLL, INC.,  
a corporation,

v.

COLBERT & CO.,  
a corporation,  
Defendant.

THE JUDICIAL TRIAL SYSTEM, INC., Plaintiff.

Plaintiff seeks to recover \$2,000.00, plus the agreed

purchase price for certain roofing material sold by it to

defendant. After failing its efforts of demand, settlement

interposed a counterclaim for damages. The same was denied

by the court without a jury, resulting in a finding and judgment

in favor of plaintiff for \$800 and against defendant upon

its counterclaim, from which defendant appeals.

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reduced sum of \$800.

Although the evidence is conflicting as to some of the

issues involved in the transaction, we think the material facts upon which defendant relies by way of defense are fairly well established. Egan testified that maintenance of the plant was among the duties entrusted to him as general manager. Prior to this transaction defendant had on occasion purchased paint from plaintiff through a salesman whose name is not disclosed in Egan's testimony. Egan said that he was unaware of the fact that plaintiff sold roofing material as well as paint. When the need for roofing material was mentioned, this salesman suggested to Egan not to do anything "until I send one of our men about the roof." Shortly thereafter Hummell called on Egan and the two men, in the presence of Anthony J. Nargie, defendant's chief engineer, discussed the condition of defendant's roof and the kind of material required for the job. Egan and Nargie took Hummell up to inspect the roof and told him that their requirement was different from ordinary roofing by reason of the spray deck, which subjected the material to continual moisture. Egan said that Hummell thereupon said, "We have something very new on the market. I just got that job licked. I got just the material for it." He thereupon showed Egan two kinds of burlap, one thicker than the other. Egan asked Hummell whether it would not be better to use the thicker material, to which Hummell replied, "No, the thinner is better because it saturates the material and you will get the effect more." Egan then told him, "I don't know anything about it; whatever material you want to use is okay with me. I want a good job," to which Hummell replied, "You leave it to me. I will take care of the whole thing," and suggested that he would have a man there on the following day to start work. Egan testified that he, Hummell and Nargie spent about half an hour on the roof and that

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Hummell made a complete examination thereof.

Hummell testified that plaintiff corporation furnished only material, and not labor. When so advised, Egan inquired whether Hummell could get some man to apply the material and Hummell suggested one Otto Blank, whom he characterized as a "good workman." After leaving Egan, Hummell contacted Blank, who agreed to report to Egan, and subsequently did so. Egan furnished two of defendant's employees to help on the job, whose assistance consisted solely of carrying the material to the roof, where it was applied by Blank under Hummell's direction. Hummell admitted that he spent part of each day directing the work and was sometimes there from one to three hours at a time, leaving instructions to Blank for applying the material whenever he left the job. It took substantially two weeks to complete the application of the material. When Hummell first brought Blank over to Egan he said, "Here is a man who knows all about the work. All you got to furnish me is two laborers to carry merchandise back and forth. My man will apply it for you. You have to pay their time." Egan said that he consented to this arrangement and paid the help.

Hummell suggested that they allow the material to set before turning on the spray, and accordingly Hummell came over about two weeks later and the water was turned on. Egan testified that a day or two thereafter the material "starts running; getting in the condensing pipes; the roof started leaking." He wrote plaintiff a letter of complaint, and after that again talked to Hummell, who said, "Don't worry about a thing. We will fix it up." The leaking continued and Egan called plaintiff's office. Hummell was not in and Egan asked that one of the representatives of the company be sent over to the plant. Thereafter Hummell brought John Lavin, who, together with Nargie, went up to inspect the roof. Attempts by plaintiff to repair the leak, over a period of time, were unsuccessful. Egan testified that he talked to Lavin about

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payment of the bill and told him, "We do not want anything for nothing. We want to pay for the job if it is satisfactory; if you will put in the right material." At the same time he called Lavin's attention to the fact that the material was running through the pipes and damaging their products. On hearing, Egan testified that the plant needed a complete new roof, either because the material furnished by plaintiff, or the manner of applying it, rendered the roof wholly defective.

Defendant produced two expert witnesses. One of these, Joseph L. Kovarsky, testified that he was a roofing contractor and had been so engaged for some 25 years. He said that his company applied and poured roofs on all types of buildings, and that he had supervised many thousands of jobs. He had examined defendant's roof in October 1940 and found numerous leaks thereon. From an examination of the job he was of opinion that the material sold by plaintiff was an asphalt roof coating applied over burlap; that in some instances asphalt products are used and in others coal tar or pitch products are applied, and on occasions a combination of both; that on "built up" roofs either asphalt or tar is used, but this was not a "built up" roof and therefore he was of opinion that coal tar or pitch applied over felt, instead of canvas, should have been used. In answer to a question whether the leaky condition of the roof was caused by the material or the manner of application used, he replied that it was due to both.

Another witness, Leroy Young, likewise testified that he was a contractor, associated with Esko & Young for seven years, and that he had been in the roofing business since 1907. During that time he had occasion to build and repair roofs on all kinds of buildings, running into many thousands. He inspected defendant's roof in the early part of 1940 and found that it had been treated with a cold application of emulsified asphalt mixed with

payment of the bill and told him, "I do not want anything for nothing. I want to pay for the job if it is satisfactory; if you will put in the right material." At the same time he called Davis's attention to the fact that the material was running through the pipes and damaging their products. In hearing, Davis testified that the plant needed a complete new roof, either because the material furnished by plaintiff, or the manner of applying it, rendered the roof wholly defective.

Defendant produced two expert witnesses. One of these, Joseph D. Kovarsky, testified that he was a roofing contractor and had been so engaged for some 25 years. He said that his company applied and poured roofs on all types of buildings, and that he had supervised many thousands of jobs. He had examined defendant's roof in October 1940 and found numerous leaks thereon. From an examination of the job he was of opinion that the material sold by plaintiff was an asphalt roof coating applied over paraffin that in some instances asphalt products are used and in others coal tar or pitch products are applied, and on occasions a combination of both; that on "built up" roofs either asphalt or tar is used, but this was not a "built up" roof and therefore he was of opinion that coal tar or pitch applied over felt, instead of canvas, should have been used. In answer to a question whether the leaky condition of the roof was caused by the material or the manner of application used, he replied that it was due to both. Another witness, Leroy Young, likewise testified that he was a contractor, associated with Tarko & Young for seven years, and that he had been in the roofing business since 1907. During that time he had occasion to build and repair roofs on all kinds of buildings, running into many thousands. He inspected defendant's roof in the early part of 1940 and found that it had been treated with a cold application of emulsified asphalt mixed with

fibre. At the time of his examination, leaks appeared in many places. The top of the coating was deteriorating. He said the roof leaked because it was not waterproof. He had had considerable experience with spray decks and stated that because of the constant contact with water, asphalt material had never proved satisfactory for any length of time, and in his opinion the material used was not suitable for the desired purpose.

Lavin testified that when he was there he did not see any leaks. He had called on Egan several months after the job was completed to collect payment of the account, and admitted that Egan told him defendant would pay "when the roof was tight." It was Lavin's opinion that if there were any leaks, they might have been caused by expansion and contraction of the building, or might have been due to reasons other than the material used.

Hummell's version of his first conversation with Egan was substantially as follows: He admitted inspecting the roof and finding "a lot of dried out places." Egan asked him, "what can you do for it?" and Hummell replied, "Well, I can give you something here that would do some good," and he proceeded to tell him what he had, suggesting that the roof might from time to time develop a leak, but the material was guaranteed for five years and any time within that period plaintiff would furnish new material without any charge. With respect to the application of the roofing material, Hummell said that when he advised Egan plaintiff did not furnish labor, the latter asked him whether he could get some men, and he happened to think of Otto Blank, whom he recommended to Egan as a good workman. He thereupon contacted Blank immediately, brought him over to Egan, and was told to go ahead with the job. Hummell admitted that he was frequently present while the material was being applied and instructed Blank how to proceed.

The defense interposed is that there was an implied warranty



by plaintiff that the material sold was reasonably fit for the purpose for which it was intended, under par. 15 (1) of chap. 121-1/2 of the Illinois Revised Statutes 1939, which provides that "where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is as [an] implied warranty that the goods shall be reasonably fit for such purpose." It appears reasonably clear from a careful examination of the evidence that the implied warranty contended for was established by defendant's witnesses. Hummell's testimony does not negative this conclusion. Egan's testimony is corroborated by Hummell, in the more important aspects of the case. Egan knew little or nothing about roofing material, whereas Hummell, by reason of his experience, was thoroughly familiar with the subject. Egan explained to him the purpose for which the material was required, showed him the roof, which Hummell inspected, and it was Hummell who suggested the quality of material to be used and assured Egan it would prove satisfactory; otherwise it is difficult to believe that Egan would have ordered the quality of material employed. Moreover, Hummell recommended Otto Blank as a good workman who was familiar with applying the material, and Hummell was present from day to day directing or supervising the job. Under the circumstances, we think the defense interposed comes within the purview of the statute. A like situation was presented in Standard Paint Co. v. E. K. Vieter & Co., 120 Va. 595, 91 S. E. 752, where roofing material sold was represented as suitable for a nonleakable roof. As in the case at bar, numerous complaints were made by the purchaser of the material and attempts were made to remedy the leak, continuing over a period of several years. Thereafter the purchaser constructed a new roof and sued

by himself that the material sold was a "complete fit for the purpose for which it was intended, under par, in (1) of class, 121-1/2 of the Illinois Revised Statutes 1939, which provides that "where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the greater or lesser) or not, there is as [an] implied warranty that the goods shall be reasonably fit for such purpose." It appears reasonably clear from a careful examination of the evidence that the implied warranty contended for was established by defendant's witnesses. Hummel's testimony does not negative this conclusion. Egan's testimony is corroborated by Hummel, in the more important aspects of the case. Egan knew little or nothing about roofing material, whereas Hummel, by reason of his experience, was thoroughly familiar with the subject. Egan explained to him the purpose for which the material was required, showed him the roof, which Hummel inspected, and it was Hummel who suggested the quality of material to be used and assured Egan it would prove satisfactory; otherwise it is difficult to believe that Egan would have ordered the quality of material employed. Moreover, Hummel recommended Otto Blank as a good workman who was familiar with applying the material, and Hummel was present from day to day directing or supervising the job. Under the circumstances, we think the defense introduced comes within the purview of the statute. A like situation was presented in Standard Paint Co. v. W. K. Victor & Co., 120 Va. 599, 91 S. E. 752, where roofing material sold was represented as suitable for a nonleakable roof. As in the case at bar, numerous complaints were made by the purchaser of the material and attempts were made to remedy the leak, continuing over a period of several years. Thereafter the purchaser constructed a new roof and sued



the vendor for the cost thereof. He had judgment and the reviewing court, in discussing the case, said that "It is perfectly well settled that when one sells an article of person<sup>al</sup> property, there is an implied guarantee that it shall be reasonably serviceable and fit for the peculiar uses to which the vendor knows it to be put [citing cases]; and it seems clear that, notwithstanding the written paper, inasmuch as it is perfectly certain that the vendor knew that the roofing was intended for buildings required to be watertight, it may be fairly inferred that there was this implied guarantee." Cases in this state dealing with the question of implied warranty are Mandel Bros. v. Mulvey, 230 Ill. App. 588; MacAndrews & Forbes Co. v. Mechanical Mfg. Co., 285 Ill. App. 81; American Spiral Pipe Works v. Universal Oil Products Co., 220 Ill. App. 383.

Plaintiff argues that if there was any warranty it was an express one and not implied. This contention is founded on the testimony of Hummell, wherein he told Egan that the material was guaranteed for five years and that if any leaks developed plaintiff would furnish new material without charge. Assuming there was such a warranty, it related solely to the quality of the material. However, the defense is predicated upon the theory that plaintiff sold the material with an implied warranty that it was reasonably serviceable and fit for the particular uses which Egan had explained to Hummell and with which the latter was thoroughly familiar, and that the material furnished by plaintiff was wholly unsuited for the job and was improperly applied under Hummell's supervision.

The record is silent as to why the court entered judgment for \$800, especially in view of defendant's admission that if liability existed plaintiff was entitled to the full sum of \$1,031.21. Although plaintiff's counsel argue that defendant has no cause to complain when it is required to respond in damages for a lesser sum than plaintiff is lawfully entitled to recover, the fact that

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sum than plaintiff is lawfully entitled to recover, the fact that

judgment was entered for the lesser sum lends support to defendant's contention that the court's conclusion was inconsistent with the proofs and with the theory upon which the case was presented, and its counsel suggests that the court evidently realized that the defense interposed was a meritorious one, but concluded that defendant had obtained some benefit from the roofing material furnished by plaintiff and therefore it was entitled to a judgment in the lesser amount, which was arbitrarily determined. In Selamakos v. Victory Ice & Ice Cream Co., 246 Ill. App. 178, the court, under similar circumstances, reversed and remanded a cause for a new trial upon the theory that the judgment was inconsistent with the proofs and that either plaintiff was entitled to a verdict for the full amount of its claim or defendant was entitled to a verdict in its favor, there being no middle ground. In Schwill & Co. v. Moulton, 168 Ill. App. 519, the court likewise set aside the verdict of a jury on the ground that it was inconsistent with any legitimate theory of the evidence and could not be accounted for except as compromise or bias.

With respect to defendant's counterclaim, we find no evidence from which a fair measure of damage could be determined, and therefore we are of opinion that the judgment against defendant on the counterclaim was properly entered.

Since the cause was heard by the court without a jury, and in view of our conclusion that the evidence and law support defendant's theory of defense, no useful purpose would be served by remanding the cause. The judgment of the Municipal court is therefore as to plaintiff's claim, affirmed as to the counterclaim, fore reversed/and judgment entered here in favor of defendant for costs.

JUDGMENT PARTLY REVERSED AND  
PARTLY AFFIRMED AND JUDGMENT  
HERE IN FAVOR OF DEFENDANT.

Seanlan, P. J., and Sullivan, J., concur.

Judgment was entered for the lesser sum and a support to defendant's contention that the court's conclusion was inconsistent with the proofs and with the theory upon which the case was presented, and its counsel suggests that the court evidently realized that the defense interposed was a meritorious one, but concluded that defendant had obtained some benefit from the material furnished by plaintiff and therefore it was entitled to a judgment in the lesser amount, which was arbitrarily determined. In Belamakes v. Victory Ice & Ice Cream Co., 140 Ill. App. 178, the court, under similar circumstances, reversed and remanded a cause for a new trial upon the theory that the judgment was inconsistent with the proofs and that either plaintiff was entitled to a verdict for the full amount of its claim or defendant was entitled to a verdict in its favor, there being no midle ground. In Belamakes & Co. v. Woulton, 108 Ill. App. 218, the court likewise set aside the verdict of a jury on the ground that it was inconsistent with any legitimate theory of the evidence and could not be accounted for except as compromise or bias.

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Since the case was heard by the court without a jury, and in view of our conclusion that the evidence and law support defendant's theory of defense, no useful purpose would be served by remanding the cause. The judgment of the municipal court is therefore affirmed as to the counterclaim, and judgment entered here in favor of defendant for costs reversed.

JUDGE IN PARTIAL REVEREND AND  
PARTIAL REVEREND AND JUDGE  
JURY IN FAVOR OF DEFENDANT

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APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

314 I.A. 1988

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Plaintiff presented two affidavits in support of his motion to vacate the dismissal. One of these, the original



affidavit of Alexander Golbus, alleged that he and Frank Golbus were associated in the practice of law and had been retained to institute suit against defendant; that between September 18, 1938, and February 25, 1941, deponent was seriously ill with coronary sclerosis; that when he returned to his office on the last named date he was permitted to practice his profession for only several hours each day; that before returning to his office, matters entrusted to the firm of Golbus & Golbus were being taken care of by his associate Frank Golbus; that prior to February 25, 1941, Frank Golbus was called for examination by the draft board under the Selective Service Act, placed in classification 1A, and directed to hold himself in readiness for induction into the service; that on or about January 20, 1941, the suit was called for trial and neither affiant nor his associate being present, the cause was dismissed by the court for want of prosecution; that immediately upon affiant's return to his office February 25, 1941, he made a careful check of the firm's files and found that this cause had been dismissed; that notwithstanding the fact that he was able to remain at his office only two or three hours a day, affiant made every effort to draw up the petition and affidavit for the vacation of the dismissal order; that he had exercised due diligence and that in "good conscience and equity" the matter should be reinstated; that he had a good cause of action and unless the dismissal order was vacated, plaintiff would lose his right to institute suit against defendant by reason of the expiration of the limitation clause of the Interstate Commerce Act.

The supplementary affidavit of Alexander Golbus, which was permitted to be filed May 13, 1941, nunc pro tunc as of May 7, 1941, alleged that March 6, 1941, he had telephoned the office of John A. Sheean, attorney for defendant, and was advised by Miss Forner of the latter's office that Sheean was out of town,





but was expected back in about a week, and that he desired to talk with deponent at a latter date; that affiant again telephoned Sheean's office on March 17, 1941, and was advised to call at the latter's office; that in pursuance of this conversation affiant came in person to the office of Sheean on March 21, 1941, and discussed with him the matter of stipulating for the reinstatement of the cause; that deponent was advised that it would be necessary to secure the consent of defendant's general counsel, and in the meantime to present in court the necessary motion, petition and affidavit for the vacation of the dismissal; that March 29, 1941, affiant mailed to defendant's attorney the required documents, including notice that he would on April 2, 1941, present his motion to the court.

Sheean's counter-affidavit averred in substance that the suit had originally come up for hearing October 30, 1939, and had on numerous occasions been continued and finally set for hearing on January 20, 1941, after due publication of the call in the Daily Municipal Court Record, which listed this cause as No. 4 on the calendar and indicated that it would be heard in Room 1105 of the City Hall; that the case did in fact come up for hearing in the room indicated on January 20, 1941, and was on that date dismissed for want of prosecution by the court of its own motion; that on April 2, 1941, more than thirty days after the date of the dismissal, plaintiff filed his motion to reinstate the cause, without having taken any steps to set aside the dismissal within the period of thirty days; that on February 7, 1941, prior to the expiration of the thirty-day period, Sheean had written and mailed to Frank Golbus, one of plaintiff's attorneys and the one actively handling the cause during most of the period while it was pending, a letter from which we quote the following: "The Zimel case No. 4083731, vs. S. P. Co., was dismissed on January 20th, 1941. In the event you want to have this rein-



stated, kindly send me a stipulation and I will be glad to sign it, but a reinstatement order must be entered before the expiration of thirty days from the date of dismissal. In view of the foregoing, please get in touch with me as soon as practicable. Yours very truly, (Signed) John A. Sheean."

Defendant's answer averred the identical facts contained in its counter-affidavit and denied that plaintiff and his legal representatives were free from negligence in allowing the cause to be dismissed for want of prosecution, or that there was any such fraud, accident or mistake as would justify the court in setting aside the dismissal.

Under the settled rule of law in this state an order of dismissal cannot properly be vacated on application made more than thirty days after the dismissal date, except on such a showing as would justify a court of equity in doing so. Imbrie v. Bear, 230 Ill. App. 155. The required showing was defined in Wackerle v. Nies, 286 Ill. App. 51, wherein the court quoted from Kretschmar v. Ruprecht, 230 Ill. 492, as follows: "Equity will not relieve against a judgment at law except in cases of fraud, accident or mistake, and then only where the party applying for relief is free from all negligence." Numerous other decisions to the same effect indicate that this rule has been generally followed. Walker v. Shreve, 87 Ill. 474; Kretschmar v. Ruprecht, 230 Ill. 492; Ward v. Durham, 134 Ill. 195. Since there is no charge that fraud was involved in the matter under consideration, plaintiff must rely on the contention that the dismissal resulted from an accident or mistake. Neither of these contingencies is set forth in the original or supplemental affidavit presented. The fatal omission in both affidavits is that the dismissal resulted without negligence on the part of plaintiff or his legal representatives. The affidavits leave no doubt that Alexander Golbus was incapacitated through illness from attending to his legal matters,

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Yours very truly, (Signed) John A. Shuman.

Defendant's answer avers that the plaintiff's facts contained in its counter-affidavit and denied that plaintiff and his legal representatives were free from negligence in allowing the cause to be dismissed for want of prosecution, or that there was any such fraud, accident or mistake as would justify the court in setting aside the dismissal.

Under the settled rule of law in this state an order of dismissal cannot properly be vacated on application made more than thirty days after the dismissal date, except on such a showing as would justify a court of equity in doing so. Idaho v. Bear, 230 Ill. App. 152. The required showing was defined in Wachner v. Niles, 286 Ill. App. 11, wherein the court quoted from Kretschmer v. Kretschmer, 230 Ill. App. 492, as follows: "Equity will not relieve against a judgment at law except in cases of fraud, accident or mistake, and then only where the party applying for relief is free from all negligence." Numerous other citations to the same effect indicate that this rule has been generally followed. Weller v. Harvey, 87 Ill. App. 474; Kretschmer v. Kretschmer, 230 Ill. App. 492; Ward v. Kretschmer, 134 Ill. App. 152. Since there is no charge that fraud was involved in the matter under consideration, plaintiff must rely on the contention that the dismissal resulted from an accident or mistake. Neither of these contentions is set forth in the original or supplemental affidavits presented. The fatal omission in both affidavits is that the dismissal resulted without negligence on the part of plaintiff or his legal representatives. The affidavits leave no doubt that Alexander holds the indisputable right through illness from attending to his legal matters.

but his associate Frank Golbus was in charge of the litigation, and although it appears that he was called for examination by the draft board, classified for service and directed to hold himself in readiness for induction, it also appears without controversy that he was here for a considerable portion of the thirty days during which application for reinstatement of the dismissal order could have been made, without taking any steps to secure the reinstatement of the cause. It does not appear from either of the affidavits that Frank Golbus was actually ordered to report for service until part of the thirty-day period had elapsed. Moreover, Sheean's letter addressed to Frank Golbus on February 7, 1941, which was well within the thirty-day period, graciously indicated counsel's intention to enter into a stipulation for reinstatement of the cause and invited counsel to "get in touch with me as soon as practicable." Notwithstanding this suggestion, the thirty-day period expired without anything having been done and, under the circumstances, plaintiff cannot fairly contend that he and his legal representatives were diligent. In all the cases that have been called to our attention the exercise of diligence and the want of negligence are prescribed as indispensable to the relief sought.

We hold that plaintiff's affidavits in support of his motion to vacate the dismissal order were insufficient to vest the court with jurisdiction to reinstate the cause, since there was neither fraud, accident nor mistake involved in the situation, and the allegations fail to set forth diligence and the want of negligence on the part of plaintiff and his legal representatives. Therefore, the order of the Municipal court entered May 7, 1941, reinstating the cause is reversed.

ORDER REVERSED.

Scanlan, P. J., and Sullivan, J., concur.

but his associate Frank Golbus was in charge of the litigation, and although it appears that he was called for examination by the grand jury, classified for services and directed to hold himself in readiness for induction, it also appears without controversy that he was here for a considerable portion of the thirty days during which application for reinstatement of the dismissal order could have been made, without taking any steps to secure the reinstatement of the cause. It does not appear from either of the affidavits that Frank Golbus was actually ordered to report for a review until part of the thirty-day period had elapsed. Moreover, Shuman's letter addressed to Frank Golbus on February 7, 1941, which was well within the thirty-day period, unquestionably indicated counsel's intention to enter into a stipulation for reinstatement of the cause and invited counsel to "get in touch with me as soon as practicable." Notwithstanding this suggestion the thirty-day period expired without anything having been done and, under the circumstances, plaintiff cannot fairly contend that he and his legal representatives were diligent. In all the cases that have been called to our attention the exercise of diligence and the want of negligence are prescribed as indispensable to the relief sought.

We hold that plaintiff's affidavits in support of his motion to vacate the dismissal order were insufficient to vest the court with jurisdiction to reinstate the cause, since there was neither fraud, accident nor mistake involved in the situation, and the allegations fail to set forth diligence and the want of negligence on the part of plaintiff and his legal representatives. Therefore, the order of the Municipal court entered May 7, 1941, reinstating the cause is reversed.

CLARENCE H. WEBER, JR.

42097

THE PEOPLE OF THE STATE OF  
ILLINOIS,

Defendant in Error,

v.

VIRGINIA WARREN,

Plaintiff in Error.

27  
ERROR TO CRIMINAL

COURT, COOK COUNTY,

314 I.A. 198<sup>2</sup>

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Virginia Warren was indicted for having committed an abortion. She was subsequently tried by jury and March 11, 1941, convicted of the crime charged. March 24, 1941 she was admitted to probation for a period of one year, to be extended for an additional year. July 29, 1941 the Chief Probation Officer of Cook county filed a sworn petition (to which was attached a memorandum prepared by the state's attorney) charging Virginia Warren with violation of the criminal statutes of Illinois and asking that a rule be entered requiring her to show cause why the probation should not be terminated. To this petition Virginia Warren filed her verified answer denying that she had violated the criminal statutes of this state subsequently to being placed on probation and questioning the sufficiency of the petition and the memorandum attached thereto. The court overruled probationer's objections to the sufficiency of the petition, terminated the probation and ordered that she be committed to the Illinois State Reformatory for Women at Dwight, Illinois, for a term of from one to ten years. This writ of error to the Criminal court is prosecuted to review and reverse the order thus entered.

The petition filed by the Chief Probation Officer informed the court that probationer, who had been convicted of abortion in the Criminal court March 11, 1941 and released on probation for one year, was arrested and charged with the crime of aborting on one Edna Ray Tenfelde July 15, 1941; that Mrs. Tenfelde and

THE PEOPLE OF THE STATE OF  
ILLINOIS

Defendant in Error,

v.

VIRGINIA WARREN,

Plaintiff in Error.

MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

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abortion. She was subsequently tried by jury and March 11, 1941,

convicted of the crime charged. March 24, 1941 she was admitted

to probation for a period of one year, to be extended for an

additional year. July 29, 1941 the Chief Probation Officer of

Cook county filed a sworn petition (to which was attached a

memorandum prepared by the state's attorney) charging Virginia

Warren with violation of the criminal statutes of Illinois and

asking that a rule be entered requiring her to show cause why

the probation should not be terminated. On this petition

Virginia Warren filed her verified answer denying that she had

violated the criminal statutes of this state subsequently to

being placed on probation and questioning the sufficiency of

the petition and the memorandum attached thereto. The court

overruled probationer's objections to the sufficiency of the

petition, terminated the probation and ordered that she be

committed to the Illinois State Reformatory for Women at Dwight,

Illinois, for a term of from one to ten years. This writ of

error to the Criminal Court is presented to review and reverse

the order thus entered.

The petition filed by the Chief Probation Officer informed

the court that probationer, who had been convicted of abortion in

the Criminal Court March 11, 1941 and released on probation for

one year, was arrested and charged with the crime of abortion on

one Edna Ray Tenebe July 15, 1941; that Mrs. Tenebe and



Mrs. Helen Warman made statements concerning the commission of a criminal offense by probationer "as is more fully set out in the statement hereto attached and made part hereof." After considerable discussion between the court and counsel as to the sufficiency of the petition, the court entered a rule on probationer to show cause, why probation should not terminate, returnable September 23, 1941. When the hearing was resumed on that date the court was furnished with a memorandum prepared by Samuel Papanek, assistant state's attorney, to Wilbert Crowley, the state's attorney's first assistant, which reads:

"Re: Virginia Warren. On July 15, 1941, I received information that Virginia Warren may be operating as an abortionist. I arranged to have Policewoman Mary Powers and Officers Moran and Suprenant investigate the premises. On arrival they were denied admission by Virginia Warren. Stated they should wait. One of her men boarders was getting dressed. Officer Suprenant watched the rear exit of this flat and saw two women leaving through the back door. The women's names are Mrs. Edna Ray Tenfelde, 25 years old, of 3833 Lake Park Avenue, and Mrs. Helen Warman, of 3970 South Ellis Avenue. Virginia Warren and these women were taken by the police to Town Hall Station and were questioned by Policewoman Mary Powers. Pursuant to a telephone call, I went to the station the same day to interrogate these women. After becoming acquainted with the facts I proceeded to verify same and my investigation disclosed that Virginia Warren had five years previously aborted Mrs. Helen Warman and that on this day she, Mrs. Warman, accompanied Mrs. Tenfelde to Mrs. Warren's home to have Mrs. Warren perform an abortion on Mrs. Tenfelde. They arrived at the premises about 11 A. M. with Mr. Tenfelde. Mr. Tenfelde left them and arranged to call for them when the abortion was completed; that Mrs. Warman and Mrs. Tenfelde went out for lunch and returned

Mrs. Helen Warren made statements concerning the commission of a criminal offense by probationer "as is more fully set out in the statement hereto attached and made part hereto." After considering the discussion between the court and counsel as to the sufficiency of the petition, the court entered a rule on probationer to show cause, why probation should not be terminated, returnable September 23, 1941. When the hearing was resumed on that date the court was furnished with a memorandum prepared by Samuel Papern, assistant state's attorney, to Albert Crowley, the state's attorney's first assistant, which reads:

"Re: Virginia Warren. On July 12, 1941, I received information that Virginia Warren may be operating as an abortionist. I arranged to have Policewoman Mary Powers and Officers Moran and Suprenant investigate the premises. On arrival they were denied admission by Virginia Warren. Stated they should wait. One of her men boarders was getting dressed. Officer Suprenant watched the rear exit of this flat and saw two women leaving through the back door. The women's names are Mrs. Anna Ray Tenfelde, 27 years old, of 3833 Lake Park Avenue, and Mrs. Helen Warren, of 3970 South Ellis Avenue. Virginia Warren and these women were taken by the police to Town Hall Station and were questioned by Policewoman Mary Powers. Pursuant to a telephone call, I went to the station the same day to interrogate these women. After becoming acquainted with the facts I proceeded to verify same and my investigation disclosed that Virginia Warren had five years previously aborted Mrs. Helen Warren and that on this day she, Mrs. Warren accompanied Mrs. Tenfelde to Mrs. Warren's home to have Mrs. Warren perform an abortion on Mrs. Tenfelde. They arrived at the premises about 11 A.M. with Mr. Tenfelde. Mr. Tenfelde left them and arranged to call for them when the abortion was completed; that Mrs. Warren and Mrs. Tenfelde went out for lunch and returned

to the Warren apartment about 1 P. M.

"That Mrs. Warren took Mrs. Tenfelde into the kitchen and in one of the rear rooms, placed her on a table, injected a hypodermic needle into her hip and with the use of some instruments, which were not seen by Mrs. Tenfelde, the abortion was performed. Mrs. Warman remained in the living room in the same apartment, and when Mrs. Warren had completed the abortion, Mrs. Warren took Mrs. Tenfelde to a bed in the rear bedroom where she was resting at the time of the arrival of the police, which was about 4:15 or 4:30 P. M.; that when the police came to the front door, Mrs. Warren instructed both women to leave by the rear door. Mrs. Tenfelde paid \$35 to Mrs. Warren for the abortion. The amount of the fee was arranged by phone on July 14, 1941, when the appointment was made for the following day. This information was supplied to Policewoman Mary Powers by Mrs. Warman and Mrs. Tenfelde, and also to me in the Lieutenant's office at the Town Hall Police Station.

"I interviewed Mrs. Warren in the Desk Sergeant's quarters. I searched and found a billfold containing two ten-dollar bills in her pocketbook. I asked Mrs. Warren where the \$35 was and Mrs. Warren after some hesitation removed some bills from under her corset. This amounted to \$35. The money was turned over to the Desk Sergeant to be held for evidence. Mrs. Warren would make no satisfactory explanation of the presence of these two women in her home. Mrs. Powers arranged for an Asheim-Zondek test to be made on Mrs. Tenfelde at the Mercy Hospital. Mr. and Mrs. Tenfelde and Mrs. Warman left the Police Station and they were fearful that newspaper publicity would be embarrassing if their names were mentioned. They were repeatedly assured by Mrs. Powers and myself that there would be no publicity. Mrs. Tenfelde was in a weak condition at the time I confronted Mrs. Warren with Mrs. Tenfelde, and at that time Mrs. Tenfelde related the occurrences of the

to the Warren apartment about 1 P. M.

"That Mrs. Warren took Mrs. Tenfelde into the kitchen and in one of the rear rooms, placed her on a table, injected a hypodermic needle into her hip and with the use of some instruments, which were not seen by Mrs. Tenfelde, the abortion was performed. Mrs. Warren remained in the living room in the same apartment, and when Mrs. Warren had completed the abortion, Mrs. Warren took Mrs. Tenfelde to a bed in the rear bedroom where she was resting at the time of the arrival of the police, which was about 4:15 or 4:30 P. M.; that when the police came to the front door, Mrs. Warren instructed both women to leave by the rear door. Mrs. Tenfelde paid \$35 to Mrs. Warren for the abortion. The amount of the fee was arranged by phone on July 14, 1941, when the appointment was made for the following day. This information was supplied to Policewoman Mary Powers by Mrs. Warren and Mrs. Tenfelde, and also to me in the Lieutenant's office at the Town Hall Police Station.

"I interviewed Mrs. Warren in the Desk Sergeant's presence. I searched and found a billfold containing two ten-dollar bills in her pocketbook. I asked Mrs. Warren where the \$35 was and Mrs. Warren after some hesitation removed some bills from under her corset. This amounted to \$35. The money was turned over to the Desk Sergeant to be held for evidence. Mrs. Warren would make no satisfactory explanation of the presence of these two women in her home. Mrs. Powers arranged for an Ashmun-Tongue test to be made on Mrs. Tenfelde at the Mercy Hospital. Mr. and Mrs. Tenfelde and Mrs. Warren left the Police Station and they were finally that newspaper publicity would be embarrassing if their names were mentioned. They were repeatedly assured by Mrs. Powers and myself that there would be no publicity. Mrs. Tenfelde was in a weak condition at the time I confronted Mrs. Warren with Mrs. Tenfelde, and at that time Mrs. Tenfelde related the occurrences of the

day as above stated. I showed her the \$35 obtained from Mrs. Warren. Mrs. Tenfelde said she could not identify the bills themselves but that she had paid \$35 in bills of the same denomination.

"Mrs. Warren was ordered to be taken to the Detective Bureau lockup, to be sent to the state's attorney's office for further questioning on the morning of July 16th, at which time a written statement was taken from her, a copy of which is attached. A complaint was signed by Officer Foley. Case was booked in Felony Court on July 17, 1941, and continued to July 28, 1941. A minute sheet was prepared and o.k'd and Grand Jury subpoenas were issued for Mr. and Mrs. Tenfelde and Mrs. Warman for Monday July 21, 1941. Prior to presenting the testimony I was informed by Mrs. Powers that something was wrong with the attitude of the witnesses. I questioned Mr. and Mrs. Tenfelde and was informed that they were going to testify that no abortion was performed; that they had not gone to the Warren home for an abortion but for the fitting of a diaphragm for Mrs. Tenfelde. The witnesses were called before the Grand Jury and their testimony under oath was in effect the only conversation with Mrs. Warren was with reference to a diaphragm. There had been no discussion of an abortion and that no abortion had been performed. Mr. and Mrs. Tenfelde both stated that Mrs. Tenfelde had been excited and nervous and that any statements that were made with reference to an abortion were made because of the strain and nervousness at that time. Mr. Tenfelde stated that he had discussed this proceeding with the company attorney, one Carl Aplon, attorney for Drexel Wine & Liquor Company; that he was not instructed, nor was it suggested that by the testimony given before the Grand Jury it would be unnecessary to testify in any further proceedings and that that would conclude the matter. All parties denied having been told by anyone to testify as they had and insisted the truth of the situation was

day as above stated. I showed her the bill obtained from Dr.

Warren. Mrs. Tenebide said she could not identify the bill.

themselves but that she had paid it in bills of the same

denomination.

"Mrs. Warren was ordered to be taken to the Detective

Bureau lockup, to be sent to the state's attorney's office for

further questioning on the morning of July 16th, at which time

a written statement was taken from her, a copy of which is

attached. A complaint was signed by Officer Foley. Case was

booked in Felony Court on July 17, 1941, and continued to July

28, 1941. A minute sheet was prepared and a kid and Grand Jury

subpoenas were issued for Mr. and Mrs. Tenebide and Mrs. Warren

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attitude of the witnesses. I questioned Mr. and Mrs. Tenebide

and was informed that they were going to testify that no abortion

was performed; that they had not gone to the Warren home for an

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mony under oath was in effect the only conversation with Mrs. Warren

was with reference to a diaphragm. There had been no discussion of

an abortion and that no abortion had been performed. Mr. and Mrs.

Tenebide both stated that Mrs. Tenebide had been worried and nervous

and that any statements that were made with reference to an abortion

were made because of the strain and nervousness at that time. Mr.

Tenebide stated that he had discussed this problem with the

company attorney, one Carl Spion, attorney for Draxel and a doctor

company; that he was not instructed, nor was it suggested that he

the testimony given before the Grand Jury it would be unnecessary

to testify in any further proceedings and that what would constitute

the matter. All parties denied having been told by anyone to

testify as they had and insisted the truth of the situation was

that they were there for the purpose of having a diaphragm fitted for Mrs. Tenfelde. Mrs. Warman further denied that she had had an abortion performed on her by Virginia Warren at any time, but did state that about five years ago she was recommended to Dr. Chaikan, who was then living at 4102 Kenmore, in the same flat with Virginia Warren, and that Dr. Chaikan performed an abortion on her. The result of the Asheim-Zondek test was negative, so that if Virginia Warren had performed any work on Mrs. Tenfelde; it was done fraudulently, as Mrs. Tenfelde apparently is not pregnant. Virginia Warren was tried and found guilty by a jury before Judge Rush of having performed an abortion and a finding of guilty was entered by Judge Rush on March 11, 1941. On March 24, 1941, Judge Rush granted an application for probation on behalf of Virginia Warren and placed her on probation for a period of one year. She is now on probation and her Probation Officer is Miss Fugate. Interview with Miss Fugate indicated that she visited the Warren home at 2 P. M. on July 15, 1941 and that she noticed a strong odor of lysol; that she told Virginia Warren that her apartment smelled like a hospital. She was a woman in a nightgown walk from one bedroom into another; that Mrs. Warren said to this woman, 'Is your husband there?' The woman was very surprised and indicated so in appearance and in speech. Mrs. Warren stated that this woman worked nights and slept days; that she was a regular roomer of hers; that the odor of lysol was due to the use of lysol to clean her house, and Mrs. Warren demonstrated how she cleaned with it in the bathroom. While in the bathroom Miss Fugate saw a woman lying in a bed just off the bathroom door. On my visit to the Warren home I found several kits of medical instruments, including speculums, dilators and curets, instruments which would ordinarily be used in the process of curetting. Mrs. Warren insists that these instruments had been left there after Dr. Chaikan's death in September, 1940, and denied that she had used same on Mrs. Ten-

that they were there for the purpose of having a hysterectomy  
for Mrs. Tenebide. Mrs. Tenebide further stated that she had an  
abortion performed on her by Virginia Warren at any time, but she  
states that about five years ago she was recommended to Dr. Chaiken,  
who was then living at 4102 Vermont, in the same block with Virginia  
Warren, and that Dr. Chaiken performed an abortion on her. The  
result of the Ashmun-Gardner test was negative, so that in Virginia  
Warren had performed any work on Mrs. Tenebide; it was done trans-  
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that these instruments had been left there after Dr. Chaiken's death  
in September, 1940, and denied that she had used same on Mrs. Tene-



felde. I believe that action should be taken in view of what our investigation has disclosed; that a hearing should be had before Judge Rush on this violation of Virginia Warren's probation."

September 23 and prior to the hearing probationer's counsel tendered to the court for filing her answer to the petition for a rule to show cause, which is as follows: "Virginia Warren, being duly sworn, admits that she was convicted of abortion on March 11, 1941, and released on probation for one year, to be extended one year upon statutory conditions, and that she was arrested and charged with the crime of aborting Edna Ray Tenfelde on July 15, 1941, as alleged in Paragraph 1 of the first page of the Petition signed by W. D. Meyering. As to the Second Paragraph in said Petition concerning statements made by certain persons that she committed a criminal offense, she knows only what she has been informed by others with reference to the making of said statements and denies that she ever violated any provision of the laws of the State of Illinois subsequent to being placed on probation on March 11, 1941; that there is attached to the petition signed by the Probation Officer a memorandum containing the typewritten signature of Assistant State's Attorney Samuel Papanek, which details certain matters which affiant is advised by her attorney to answer, and for answer thereto states under oath that she did not commit or attempt to commit any abortion upon the person of Edna Ray Tenfelde on July 15, 1941, or on any other date;

"That Mrs. Tenfelde, accompanied by Mrs. Warman, came to her home on July 15, 1941, and inquired for Dr. Chaikan, who lived in affiant's home until his death on September 11, 1940; that she had no conversation regarding an abortion with either of these woman, or any other person except to advise them of Dr. Chaikan's death; that when police officers came to the door of affiant's home, these women became frightened and insisted upon going out

I believe that section should be taken in view of the fact that our investigation has disclosed that a woman would be prosecuted before Judge Bush on this violation of Virginia's probation.

September 23 and prior to the hearing probation was considered tendered to the court for filing her answer to the petition for a writ to show cause, which is as follows: "Virginia, being duly sworn, admits that she was convicted of abortion on March 11, 1941, and released on probation for one year, to be terminated one year upon statutory conditions, and that she was arrested and charged with the crime of aborting when she was on July 15, 1941, as alleged in Paragraph 1 of the first page of the petition signed by W. C. Meyerling. As to the second paragraph in said Petition concerning statements made by certain persons that she committed a criminal offense, she knows only what she has been informed by others with reference to the making of said statements and denies that she ever violated any provision of the laws of the State of Illinois subsequent to being placed on probation on March 11, 1941; that there is attached to the petition signed by the Probation Officer a memorandum containing the typewritten signature of Assistant State's Attorney Samuel Cohen, which details certain matters which affiant is advised by her attorney to answer, and for answer thereto states that she did not commit or attempt to commit any abortion upon the person of Anna Ray Tenfelde on July 15, 1941, or on any other date; "That Mrs. Tenfelde, accompanied by Mrs. Cohen, came to her home on July 15, 1941, and inquired for Dr. Hoffman, who lives in affiant's home until his death on September 11, 1940; that she had no conversation regarding an abortion with either of these women, or any other person except to advise them of Dr. Hoffman's death; that when police officers came to the door of affiant's home, these women became frightened and insisted upon going out

the back way; that they made some statements in the presence of this affiant which affiant denied at all times; that money found upon affiant's person was her own and was not secured from either of these women; that Mrs. Tenfelde and Mrs. Warman testified before the Grand Jury under oath that this affiant did not perform any abortion on Mrs. Tenfelde and stated that the statements previously made by them were made under duress while excited and nervous and were untrue; that on July 15, 1941, a woman and two men roomed in her home; that the woman roomer worked as a cook in a restaurant at night and slept during the day; that at the time Mrs. Fugate, the Probation Officer, came to her home at 2 o'clock on July 15, affiant was in the process of cleaning the bathroom with a Lysol solution and that the woman roomer aforesaid was asleep in her room just off the bathroom door; that the medical instruments in her home at the time the police were there on July 15, were the property of Dr. Chaikan, deceased, and were kept in her home by his brother, Albert Chaikan, a druggist, who resided with her until August 30, 1941, at which time affiant gave up the apartment occupied by her as her home; that the matters above referred to were submitted to the Grand Jury of Cook County during its regular session and that the Grand Jury failed to return an indictment charging her with a violation of the Criminal Statutes of Illinois; that the facts and things set up in the Probation Officer's Petition did not make a showing that this affiant violated any Criminal Law of Illinois or any ordinance of any municipality of said State; that the facts and things set up in the memorandum not under oath and not signed by the Assistant State's Attorney, also did not set up sufficient facts to constitute a crime or violation of the laws of Illinois. Affiant prays that the petition be dismissed for insufficiency to show the commission of a crime by affiant or the violation of any ordinance and that she be dismissed on the rule to show cause on this <sup>affidavit</sup> ~~affidavit~~ which she herewith tenders to this Court as her

the back way; that they made some statements in the presence of this affiant which affiant denied at all times; that money found upon affiant's person was her own and was not received from either of these women; that Mrs. Teneide and Mrs. Teneide testified before the Grand Jury under oath that this affiant did not perform any abortion on Mrs. Teneide and stated that the statements previously made by them were made under duress while excited and nervous and were untrue; that on July 17, 1941, a woman and two men roomed in her home; that the woman roomer worked as a cook in a restaurant at night and slept during the day; that at the time Mrs. Teneide, the Probation Officer, came to her home at 2 o'clock on July 17, affiant was in the process of cleaning the bathroom with a lyeol solution and that the woman roomer afterwards was asleep in her room just off the bathroom door; that the medical instruments in her home at the time the police were there on July 17, were the property of Dr. Chaikhan, deceased, and were kept in her home by his brother, Albert Chaikhan, a druggist, who resided with her until August 30, 1941, at which time affiant gave up the apartment occupied by her as her home; that the matters above referred to were submitted to the Grand Jury of Cook County during its regular session and that the Grand Jury failed to return an indictment charging her with a violation of the Criminal Statutes of Illinois; that the facts and things set up in the Probation Officer's petition did not make showing that this affiant violated any Criminal Law of Illinois or any ordinance of any municipality of said State; that the facts and things set up in the memorandums not under oath and not signed by the Assistant State's Attorney, also did not set up sufficient facts to constitute a crime or violation of the laws of Illinois. Affiant prays that the petition be dismissed for insufficiency to show the commission of a crime by affiant or the violation of any ordinance and that she be dismissed on the rule to show cause on this petition which she herewith tenders to this Court as her affidavit.

answer to the petition hereinbefore filed."

Section 787, chap. 38, Ill. Rev. Stats. 1941, imposes as one of the conditions for release on probation "That the probationer shall not, during the term of his probation, violate any criminal law of the State of Illinois, or any ordinance of any municipality of said state." Section 789 of the same statute provides that "At any time during the period of probation, the court may, upon report by a probation officer or other satisfactory proof of the violation by the probationer of any of the conditions of his probation, revoke and terminate the same \*\*\*." (Italics ours.)

No evidence was adduced upon the hearing. Therefore, the sole question presented is whether the report of the probation officer, when taken together with the memorandum of the state's attorney, constitutes satisfactory proof of the violation of the probation, especially in view of the denials made in respondent's answer and her challenge to the sufficiency of the report. The statements alleged to have been made by Mrs. Tenfelde and Mrs. Warman "concerning the commission of a criminal offense by her [probationer]," as alleged in the petition, were subsequently denied by these women, and the grand jury, to whom the matter was presented by the state's attorney during its regular session, failed to return an indictment against respondent. Moreover, the state's attorney's memorandum states that Policewoman Mary Powers, who interrogated Mrs. Tenfelde and Mrs. Warman, arranged for an Asheim-Zondek test at Mercy Hospital to determine the fact of pregnancy, and further states that the test showed a negative result. The inference from this circumstance is that Mrs. Tenfelde was not pregnant and consequently abortion was unnecessary.

The only other information presented to the court is found in the state's attorney's memorandum. The statute prescribes that the court may revoke and terminate probation "upon report by a probation officer

answer to the petition heretofore filed."

Section 787, chap. 36, Ill. Rev. Stat. 1901, imposes

as one of the conditions for release on probation "that the

probationer shall not, during the term of the probation, violate

any criminal law of the state of Illinois, or any ordinance of

any municipality of said state." Section 789 of the same statute

provides that "At any time during the period of probation, the

court may, upon report by a probation officer or other satisfactory

proof of the violation by the probationer of any of the conditions

of his probation, revoke and terminate the same." (Ill. Stat.

ours.)

No evidence was adduced upon the hearing. Therefore, the

sole question presented is whether the report of the probation

officer, when taken together with the memorandum of the state's

attorney, constitutes satisfactory proof of the violation of the

probation, especially in view of the denial made by respondent's

answer and her challenge to the sufficiency of the report. The

statements alleged to have been made by Mrs. Taylor and the

"straw" concerning the commission of a criminal offense by her

[probationer], "as alleged in the petition, were substantially

denied by these women, and the Grand Jury, to whom the matter

was presented by the state's attorney during its regular session,

failed to return an indictment against respondent. Moreover,

the state's attorney's memorandum stated that Miss Mary

Powers, who interrogated Mrs. Taylor and Mrs. Taylor, arranged

for an Ashmun-Henderson test at Mercy Hospital to determine the fact

of pregnancy, and further stated that the test showed a negative

result. The inference from this circumstance is that Mrs. Taylor

was not pregnant and consequently abortion was unnecessary.

The only other information presented to the court is found

in the state's attorney's memorandum. The statute prescribes that

the court may revoke and terminate probation "upon report by a pro-

bation officer or other satisfactory proof of the violation by the probationer of any of the conditions of his probation." To sustain the order we should be required to hold that the state's attorney's memorandum complied with the requirement of the statute in furnishing "other satisfactory proof" of the violation by the probationer. A careful examination of the memorandum clearly indicates that the statements made by Papanek were predicated almost entirely on hearsay and information which had been given to him by others. Papanek could not have testified to the statements made by him because they were not within his own knowledge, and therefore his memorandum cannot be considered as satisfactory proof of the matters contained in it. It was within the power of the court to require the probation officer to furnish satisfactory proof before acting upon the petition. The summary revocation of the probation upon hearsay statements, without a hearing, was not a sufficient compliance with the statute.

We hold that neither the report nor the state's attorney memorandum contained the satisfactory proof required by the statute, and therefore the rule on respondent to show cause, should have been discharged. Accordingly, the judgment or order of the Criminal court is reversed.

JUDGMENT OR ORDER REVERSED.

Scanlan, P. J., and Sullivan, J., concur.

bottom of the other satisfactory proof of the violation by the probationer of any of the conditions of his probation. To sustain the order we should be required to hold that the attorney's memorandum complied with the requirement of the statute in furnishing "other satisfactory proof" of the violation by the probationer. A careful examination of the memorandum clearly indicates that the statements made by Papaneak were contradicted almost entirely on hearsay and information which had been given to him by others. Papaneak could not have testified to the statements made by him because they were not within his own knowledge, and therefore his memorandum cannot be considered a satisfactory proof of the matters contained in it. It was within the power of the court to require the probation officer to furnish satisfactory proof before acting upon the petition. The summary revocation of the probation upon hearsay statements, without a hearing, was not a sufficient compliance with the statute.

We hold that neither the report nor the state's attorney memorandum contained the satisfactory proof required by the statute, and therefore the rule on respondent to show cause, should have been discharged. Accordingly, the judgment or order of the Criminal court is reversed.

JUDGMENT OF MR. J. W. VERARD.

McCallan, J., and Sullivan, J., concur.



SALVATORE SAVINA, a minor by  
MICHELE SAVINA, his father and  
next friend,

Appellant,

vs.

NATIONAL BRICK COMPANY, a  
corporation, and JOHN P. TRAFF,  
Appellees.

APPEAL FROM  
SUPERIOR COURT  
COOK COUNTY.

314 I.A. 199

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment entered upon the verdict of a jury in favor of defendants, National Brick Company and John P. Traff, and against plaintiff, Salvatore Savina, in an action brought by the latter for damage for personal injuries alleged to have been received as the result of the negligent operation of an automobile owned by the National Brick Company and driven by Traff.

Plaintiff's complaint alleged substantially that defendants owned and operated a certain automobile on Sherman avenue at or near South boulevard in the city of Evanston, Illinois, on June 7, 1936; that it was their duty to avoid running into or colliding with persons rightfully upon said highway; that plaintiff was a minor walking along the highway in the exercise of the care and caution that an ordinarily prudent child of his age and intelligence would have used under the same or similar circumstances; and that the defendants were negligent (a) in that they failed to keep a proper lookout, (b) they were guilty of general negligence in the operation of the automobile, (c) they operated the car with defective brakes, (d) they failed to give warning of their approach, and (e) they failed to keep their car under proper control; that by and through their negligence as aforesaid their automobile was so driven that it ran into and collided with plaintiff; that plaintiff was seriously and permanently injured; and that the father and next friend, Michele Savina, assigned his claim to the minor.



Defendant National Brick Company's answer admitted the ownership of the automobile in question but denied its operation thereof as charged in the complaint. It then denied all of the material allegations of the complaint.

Defendant Traff's answer admitted that he operated the automobile as charged in the complaint but denied his ownership thereof. It then denied all of the material allegations of the complaint.

Plaintiff was a few months less than three years old at the time of the occurrence. No defense of contributory negligence on the part of his parents was interposed.

Traff was employed by the National Brick Company and it is undisputed that at the time of the occurrence he was operating the automobile as a servant of said company and within the scope of his employment.

Plaintiff's theory of fact is that his home was on the northeast corner of Sherman street and South boulevard in the city of Evanston, Illinois; that he had been playing on the parkway between the east curb of Sherman street and the sidewalk at a point about opposite the rear entrance to his home, which was about forty feet north of the north curb of South boulevard; that he had stepped off the curb a few feet west on to Sherman street when he was struck by defendants' automobile; that Sherman street is a north and south street; that defendants' automobile was traveling south on Sherman street and that a short time before it struck him, it had passed two other automobiles also traveling south on Sherman street; that when it passed said automobiles, defendants' car was proceeding south on the east side of the street; that at the time of the impact plaintiff was on Sherman street about four feet west of the east curb thereof and defendants' car was traveling at an excessive rate of speed; and that it was a clear day, the street was dry and the defendant Traff, who was driving the automo-



bile, had an unobstructed view to the south on Sherman street.

No witness testified at the trial to having seen the actual impact or as to what occurred immediately prior thereto.

Defendants' theory of fact is that Traff was driving the automobile south on Sherman street at a speed of from ten to twenty miles an hour; that he was traveling about midway between the center line of ~~the~~ said street and the west curb thereof; that he passed no automobiles going south and that there were no other automobiles going either south or north on Sherman street in that vicinity at the time of the occurrence; that he did not at or prior to the time of the impact drive the automobile east of the center line of Sherman street, which is thirty-four feet wide; that there was an automobile parked at the east curb of Sherman street facing north about ninety-two feet north of the north curb of South boulevard; that as he passed this parked automobile he heard a "thud;" that as he proceeded south he looked into his rear view mirror and saw an "object" on the street; and that he stopped his car just north of South boulevard and walked back to where plaintiff was lying, west of the center line of Sherman street. Traff did not see plaintiff on the east sidewalk or on the parkway between the sidewalk and the east curb or on the street, either prior to or at the time of the impact.

Inasmuch as this cause must be reversed because of the impropriety of certain instructions given to the jury, we refrain from discussing the evidence in detail since in all likelihood the case will be retried.

Plaintiff contends that the trial court erred in giving the following instructions to the jury:

"10. The jury are instructed that there is no presumption of negligence on the part of the defendants from the fact alone that an accident happened, or that the plaintiff received an injury. Before defendants can be held liable in this case you must believe from the evidence that the defendants were guilty of the omission of some duty or the commission of some negligent act that occasioned the injury to the plaintiff.

"11. The court instructs the jury that if they believe from the evidence in this case that the defendants' driver was driv-



ing the automobile of the defendants and was exercising ordinary care in the management and operation of the same, and that the plaintiff at the time and place of the injury suddenly and unexpectedly and without the knowledge of the defendant ran into the automobile of the defendants and was thereby injured, then in order to charge the defendants with a duty to avoid injuring the plaintiff the plaintiff must show by a preponderance of the evidence in the case that the circumstances were of such character that the defendant driver had an opportunity to become conscious of the facts giving rise to such duty and a reasonable opportunity in the exercise of care and caution to perform such duty.

"12. The court instructs the jury that if they believe from the evidence under the instructions of the court that the plaintiff was suddenly and without any negligence or fault on the part of the defendants placed in a position of danger, then in order to charge the defendants with the duty to avoid injuring the plaintiff, the plaintiff must prove by a preponderance of the evidence that the circumstances were such that the driver of the defendants' car had time and opportunity to become conscious by the exercise of ordinary care of the facts giving rise to such duty, and a reasonable opportunity to perform it.

"And if the jury further believe from the evidence under the instructions of the court that the circumstances as shown by the evidence did not charge the said defendants with a duty thus defined, or if the jury believe from the evidence under the instructions of the court that the driver of defendants' automobile did not have a reasonable opportunity to perform ~~bb~~ the exercise of that degree of care elsewhere required in these instructions such duty as thus defined, then they should find the defendants not guilty.

cxXXXXXX

"14. You are instructed that if you find from the evidence and under the instructions of the court that the injury to the plaintiff was caused by an accident and without negligence of the defendants, then you are instructed that the plaintiff cannot recover.

As to Instruction No. 10, it is sufficient to state that an almost identical instruction was condemned in Smith v. Illinois Power Company, 279 Ill. App. 509. In that case at defendant's request the trial court gave the following instruction: "The court instructs the jury that there is no presumption of negligence arising against the defendant from the simple fact of itself that the plaintiff was injured as a result of the occurrences in question." There the court said at p. 520: "This instruction is an abstract statement of a proposition of law and it was not applicable to the facts in the case. It was irrelevant and

ing the automobile of the defendant and was exercising due care in the management and operation of the same, and that the plaintiff at the time and place of the injury negligently and unexpectedly and without the knowledge of the defendant was in the automobile of the defendant and was thereby injured, then in order to charge the defendant with a duty to avoid injuring the plaintiff the plaintiff must show by a preponderance of the evidence in the case that the circumstances were of such character that the defendant driver had an opportunity to become conscious of the facts giving rise to such duty and a reasonable opportunity in the exercise of care and caution to perform such duty.

"12. The court instructs the jury that if they believe from the evidence under the instructions of the court that the plaintiff was suddenly and without any negligence or fault on the part of the defendant placed in a position of danger, then in order to charge the defendant with the duty to avoid injuring the plaintiff, the plaintiff must prove by a preponderance of the evidence that the circumstances were such that the driver of the defendant's car had time and opportunity to become conscious of the exercise of ordinary care of the facts giving rise to such duty, and a reasonable opportunity to perform it.

"And if the jury further believe from the evidence under the instructions of the court that the circumstances were as shown by the evidence did not charge the duty defendant with a duty thus defined, or if the jury believe from the evidence under the instructions of the court that the driver of defendant's automobile did not have a reasonable opportunity to perform by the exercise of that degree of care elsewhere required in these instructions such duty as thus defined, then they should find the defendant not guilty.

\*\*\*\*\*

"14. You are instructed that if you find from the evidence and under the instructions of the court that the injury to the plaintiff was caused by an accident and without negligence of the defendant, then you are instructed that the plaintiff cannot recover.

As to Instruction No. 10, it is sufficient to

state that an identical instruction was condemned in Smith

v. Illinois Power Company, 7 Ill. App. 2 113. It was so held in

defendant's request the trial court gave the following instruction:

"The court instructs the jury that there is no presumption of

negligence arising against the defendant from the simple fact of

itself that the plaintiff was injured as a result of the occur-

rences in question." There the court said at p. 500: "This in-

struction is an abstract statement of a proposition of law and is

was not applicable to the facts in the case. It was irrelevant and



misleading." Instruction No. 10 is not applicable to the facts in this case and should not have been given.

The giving of Instruction No. 11 at defendants' request constituted reversible error. It suggested to the jury that plaintiff "suddenly and unexpectedly \* \* \* ran into the automobile" when there was not a particle of evidence in the record to that effect. Even the defendant Traff, who drove the automobile, did not testify to any fact or circumstance from which it could be fairly inferred that plaintiff "suddenly and unexpectedly \* \* \* ran into the automobile." Traff stated definitely that he did not see plaintiff at all, either prior to or at the time of the impact. According to Traff, although he had a clear and unobstructed view to the south as he approached the point of the occurrence from the north, he did not know where plaintiff came from or how he came into contact with the automobile. There was no evidence which tended, even slightly, to show that plaintiff ran into the automobile and it was highly improper to instruct the jury concerning a fact not in evidence. That plaintiff ran into the automobile was first suggested by this instruction and not from any fact or circumstance in evidence in this case. In Mississippi Lime & Material Co. v. Smith, 282 Ill. App. 361, the court said at p. 369: "Instructions which suggest matters not suggested by the evidence have been universally condemned by our Supreme Court." In Mayer v. Springer, 192 Ill. 270, the court stated at p. 275: "It is the duty of the court to give to the jury, in its instructions, rules of law which are applicable to the evidence in the case, and to make the application so that the jury may understand the relation of the rules to the evidence." Instruction No. 11 is erroneous for the further reason that it states the rule or law applicable to a situation where the driver of an automobile is confronted with a sudden and unexpected emergency and where, after discovering the

"misleading." Instruction No. 10 is not applicable to the facts in this case and should not have been given.

The giving of Instruction No. 11 at defendant's

request constituted reversible error. It suggested to the jury

that plaintiff "suddenly and unexpectedly" \* \* \* ran into the

automobile" when there was not a particle of evidence in the

record to that effect. Even the defendant itself, who gave the

automobile, did not testify to any fact or circumstance from which

it could be fairly inferred that plaintiff "suddenly and unexpectedly"

ran into the automobile. " \* \* \* Plaintiff stated definitely that

he did not see plaintiff at all, either prior to or at the time of

the impact. According to plaintiff, although he had a clear and un-

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or how he came into contact with the automobile. There was no evi-

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the automobile and it was highly improper to instruct the jury con-

cerning a fact not in evidence. That plaintiff ran into the auto-

mobile was first suggested by this instruction and not from any

fact or circumstance in evidence in this case. In Misleading lines

& Material Co. v. Smith, 262 Ill. App. 581, the court said at p.

389: "Instructions which suggest matters not suggested by the evi-

dence have been universally condemned by our supreme court." In

Mayer v. Springer, 194 Ill. App. 250, the court stated at p. 252: "It

is the duty of the court to give to the jury, in its instructions,

rules of law which are applicable to the evidence in the case, and

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tion of the rules to the evidence." Instruction No. 11 is erroneous

for the further reason that it states the rule of law applicable to

a situation where the driver of an automobile is confronted with a

sudden and unexpected emergency and where, after discovering the

danger, he has neither the time nor the opportunity to avoid the injury. Here there are no facts or circumstances in evidence to which said rule may be applied. Traff certainly could not have been confronted with any emergency as to plaintiff, as according to his own evidence, he did not see the boy until after the impact.

Instruction No. 12 likewise had to do with the existence of a sudden emergency and this instruction also constituted reversible error for the reasons stated in our discussion of Instruction No. 11.

Instruction No. 14 should not have been given to the jury. There is no fact or circumstance in evidence in this case that would warrant the jury in finding that "the injury to plaintiff was caused by an accident." Under plaintiff's theory of fact, his injury could not have been caused by an accident and neither could it have been so caused under defendants' theory of fact. It is stated in defendant's brief that "so far as the evidence shows the plaintiff suddenly and unexpectedly ran from behind a standing automobile and into the rear of defendants' car" and that "he was not seen by the defendant in the street though he was looking." This theory must have been evolved from the imagination of defendants' counsel since there is no evidence in the record to support it. If defendants' car came into contact with the boy about four feet west of the center line of Sherman street, where Traff stated the impact took place, to reach that point plaintiff would have had to travel a distance of more than twenty-one feet from the east curb of Sherman street or fifteen or sixteen feet from the west side of the parked automobile if the boy emerged from behind said parked car. In either event he would have been in plain view of the driver of the automobile as the latter approached from the north, while the boy traveled either of the distances indicated. In passing upon a similar instruction

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in Mississippi Lime & Material Co. v. Smith, *supra*, the court said at pp. 368, 369:

"No negligence is shown in the conduct of the appellant. Negligence is shown in the conduct of appellees. The result which followed was the proximate result of appellee's negligence. How may we then account for this verdict? In such cases it is particularly essential that a jury be properly and carefully instructed. There is a theory upon which this jury might have acted, and that theory evolves from the charge of the court. There is a suggestion that an accident brought about Douglas' death. That suggestion does not come from any evidence or circumstance in this case. It comes for the first time when the court by its charge injected into the case the theory that the death of Douglas might have come about through an accident, and if it did, there could be no recovery. It is true that this part of the charge is given in most personal injury cases, and in most injury cases the charge is proper, but in this case we can see nothing in this record, - certainly not of fact, and not of circumstances, - which could have suggested to the jury that the death of Douglas might have come about through an accident. It was wrong in our judgment for the court to make that suggestion for the first time. Instructions which suggest matter not suggested by the evidence have been universally condemned by our Supreme Court. Chicago & A. Ry. Co. v. Adler, 129 Ill. 335; Indianapolis & St. L. Ry. Co. v. Miller, 71 Ill. 463; Streeter v. Humrichouse, 357 Ill. 234."

It is the well settled rule that where, as here, there is a sharp conflict in the evidence it is particularly essential that the jury be carefully and properly instructed.

For the reasons stated herein the judgment of the Superior court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Scanlan, P. J., and Friend, J., concur.

in Michigan State Bar Association v. Michigan State Bar Association, 10 Mich. 2d 100, 100 Mich. 2d 100.

at p. 388, 389:

"No negligence is shown in the conduct of the appellant. Negligence is shown in the conduct of appellee. The result which followed was the proximate result of appellee's negligence. How may we then account for this verdict? In each case it is peculiarly essential that a jury be properly and carefully instructed. There is a theory upon which this jury might have acted, and that theory evolves from the charge of the court. There is a suggestion that an accident brought about Douglas' death. That suggestion does not come from any evidence or circumstance in this case. It comes for the first time when the court by its charge injected into the case the theory that the death of Douglas might have come about through an accident, and if it did, there could be no recovery. It is true that this part of the charge is given in most personal injury cases, and in most injury cases the charge is proper, but in this case we can see nothing in this record, - certainly not of fact, and not of circumstances, - which could have suggested to the jury that the death of Douglas might have come about through an accident. It was wrong in our judgment for the court to make that suggestion for the first time. Instructions which suggest matter not suggested by the evidence have been universally condemned by our Supreme Court. Chicago & A. Ry. Co. v. Adler, 129 Ill. 355; Indiana Gas & Electric Co. v. Miller, 171 Ill. 433; Greene v. Hamilton, 171 Ill. 234."

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For the reasons stated herein the judgment of

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trial

REVERSED AND REMANDED.

Seaman, P. J., and Friend, J., concur.

41510

ALVIN F. EITELGEORGE, for use  
of JAMES W. JULIAN,  
Appellee,

v.

GENERAL FINANCE CORPORATION,  
a corporation,  
Appellant.

29  
APPEAL FROM SUPERIOR  
COURT, COOK COUNTY.

314 I.A. 199<sup>2</sup>

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by the garnishee defendant, General Finance Corporation, from a judgment for \$743.84 entered against it in favor of the beneficial plaintiff, James W. Julian. Originally there were two garnishee defendants but the Motor Car Loan Company of Illinois was discharged. A series of eighteen demands in garnishment were filed April 19, 1940, and an affidavit for garnishment was filed at the same time, pursuant to which summons in garnishment was issued against and served upon General Finance Corporation on said date. On April 22, 1940, an answer of "No Funds" was filed by the garnishee and a replication to said answer was filed by plaintiff April 23, 1940. The cause was tried on the following stipulation of facts:

"1. That on the 19th day of April, 1940, a garnishment suit was filed by the plaintiff, James W. Julian, against General Finance Corporation and Motor Car Loan Company of Illinois, a corporation, and on the 19th day of April, A. D. 1940, service of said garnishees was had by summons. Answer of garnishee was filed on the 22nd day of April, 1940,

"2. That the following demand in garnishment was served upon General Finance Corporation and Motor Car Loan Company of Illinois, a corporation,

"Demand in garnishment dated 1/26/40 served at 1:10 P.M. upon Maurice Daniels.

"Demand in garnishment dated 1/31/40 served at 12:50 P.M. upon Maurice Daniels.

"Demand in garnishment dated 2/5/40 served at 11:22 P.M. upon William V. Brooks.

ALVIN F. BROWN, for use  
of JAMES W. BROWN,  
appellee,

THIRD JUDICIAL CIRCUIT  
COURT, CHICAGO, ILL.

GENERAL FINANCE CORPORATION,  
a corporation,  
appellant.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.  
This is an appeal by the garnishee defendant, General  
Finance Corporation, from a judgment for \$74,040 entered  
against it in favor of the beneficial plaintiff, James W.  
Brown. Originally there were two garnishees defendants,  
but the Motor Car Loan Company of Illinois was discharged,  
A series of eighteen demands in garnishment were filed April  
19, 1940, and an affidavit for garnishment was filed at the  
same time, pursuant to which summons in garnishment was issued  
against and served upon General Finance Corporation on said  
date. On April 22, 1940, an answer of "no funds" was filed  
by the garnishee and a replication to said answer was filed  
by plaintiff April 28, 1940. The case was tried on the  
following stipulation of facts:

- "1. That on the 19th day of April, 1940, a garnishment  
suit was filed by the plaintiff, James W. Brown, against  
General Finance Corporation and Motor Car Loan Company of  
Illinois, a corporation, and on the 19th day of April, 1940,  
service of said garnishment was made by summons, return  
of garnishee was filed on the 22nd day of April, 1940.
- "2. That the following demand in garnishment was served  
upon General Finance Corporation and Motor Car Loan Company  
of Illinois, a corporation,  
"Demand in garnishment dated 1/30/40 served at 1:10 P.M.  
upon Maurice Daniels.  
"Demand in garnishment dated 1/31/40 served at 12:30 P.M.  
upon Maurice Daniels.  
"Demand in garnishment dated 2/5/40 served at 11:22 A.M.  
upon William V. Brooks.



"Demand in garnishment dated 2/10/40 served at 10:40 P.M. upon Maurice Daniels.

"Demand in garnishment dated 2/14/40 served at 4:40 P.M. upon William V. Brooks.

"Demand in garnishment dated 2/19/40 served at 2:50 P.M. upon Maurice Daniels.

"Demand in garnishment dated 2/24/40 served at 11:25 A.M. upon Violet Barton.

"Demand in garnishment dated 2/29/40 served at 10:50 A. M. upon Violet Barton.

"Demand in garnishment dated 3/5/40 served at 10:20 A.M. upon Violet Barton.

"Demand in garnishment dated 3/9/40 served at 11:23 A.M. upon Dorothy Eldine.

"Demand in garnishment dated 3/14/40 served at 10:19 A.M. upon Violet Barton.

"Demand in garnishment dated 3/18/40 served at 1:00 P.M. upon Violet Barton.

"Demand in garnishment dated 3/23/40 served at 12:40 P.M. upon Violet Barton.

"Demand in garnishment dated 3/28/40 served at 12:15 P.M. upon Sharon Kraumhauer.

"Demand in garnishment dated 4/2/40 served at 11:20 A.M. upon Violet Barton.

"Demand in garnishment dated 4/6/40 served at 12:35 P.M. upon Violet Barton.

"Demand in garnishment dated 4/11/40 served at 11:55 A.M. upon William V. Brooks.

"Demand in garnishment dated 4/16/40 served at 11:10 A.M. upon Violet Barton.

"That the said defendant, Alvin F. Eitelgeorge, was employed on January 1, 1940, and is and was employed at the time of answer by Garnishee by the General Finance Corporation and resides in the State of Ohio.

"3. That no service of demand in garnishment was made upon the defendant, Alvin F. Eitelgeorge, employee of the General Finance Corporation.

4. That on the 1st day of February, A. D. 1940, the General Finance Corporation as employer of said Alvin F. Eitelgeorge, paid him the sum of \$177.45 in advance for February salary; that on the 1st day of February, A. D. 1940, a check in the sum of \$49.50 was issued to said Alvin F. Eitelgeorge in advance for February salary; that on the 17th day of February, 1940, the sum of \$11.63 was paid by the

- "Demand in garnishment dated 2/1/40 served at 11:40 A.M. upon Maurice Daniels.
- "Demand in garnishment dated 2/1/40 served at 4:40 P.M. upon William V. Brooks.
- "Demand in garnishment dated 2/1/40 served at 2:50 P.M. upon Maurice Daniels.
- "Demand in garnishment dated 2/1/40 served at 11:25 A.M. upon Violet Barton.
- "Demand in garnishment dated 2/1/40 served at 10:30 A.M. upon Violet Barton.
- "Demand in garnishment dated 2/1/40 served at 11:30 A.M. upon Violet Barton.
- "Demand in garnishment dated 2/1/40 served at 11:23 A.M. upon Dorothy Liddle.
- "Demand in garnishment dated 2/1/40 served at 1:10 P.M. upon Violet Barton.
- "Demand in garnishment dated 2/1/40 served at 1:00 P.M. upon Violet Barton.
- "Demand in garnishment dated 2/1/40 served at 11:40 A.M. upon Violet Barton.
- "Demand in garnishment dated 2/1/40 served at 12:15 P.M. upon Sharon Krawchuk.
- "Demand in garnishment dated 2/1/40 served at 11:15 A.M. upon Violet Barton.
- "Demand in garnishment dated 2/1/40 served at 12:15 P.M. upon Violet Barton.
- "Demand in garnishment dated 2/1/40 served at 11:25 A.M. upon William V. Brooks.
- "Demand in garnishment dated 2/1/40 served at 11:15 A.M. upon Violet Barton.
- "That the said defendant, Edwin E. Fitzgerald, was employed on January 1, 1940, and is and was employed at the time of answer by garnishee by the General Finance Corporation and resides in the State of Ohio.
- "3. That no service of demand in garnishment was made upon the defendant, Edwin E. Fitzgerald, employee of the General Finance Corporation.
4. That on the 1st day of February, 1940, the General Finance Corporation as employer of said Edwin E. Fitzgerald, paid him the sum of \$177.42 in advance for February salary; that on the 1st day of February, 1940, a check in the sum of \$45.50 was issued to said Edwin E. Fitzgerald in advance for February salary; that on the 1st day of February, 1940, the sum of \$11.93 was paid by the

General Finance Corporation to Alvin F. Eitelgeorge for January bonus; that on the 13th day of March, A. D. 1940, the sum of \$22.96 was paid by the General Finance Corporation to Alvin F. Eitelgeorge, as February bonus; that on the 23rd day of February, 1940, the sum of \$229.55 was paid by the General Finance Corporation to Alvin F. Eitelgeorge in advance for March salary; that on the 1st day of April, 1940, the sum of \$252.75 was paid by the General Finance Corporation to Alvin F. Eitelgeorge in advance for April salary.

"5. That the defendant, Alvin F. Eitelgeorge, has not filed with the garnishees, or either of them, an affidavit claiming statutory exemptions, nor has either of the garnishees, General Finance Corporation or Motor Car Loan Company of Illinois, a corporation, claimed statutory exemptions for Alvin F. Eitelgeorge."

After a hearing on the stipulated facts judgment for \$743.84 was entered against the garnishee defendant, General Finance Corporation, as heretofore shown.

This action was brought under section 14 of the Garnishment Act (ch. 62, Ill. Rev. Stat. 1939), the pertinent portions of which are as follows:

"\*\*\* Before bringing suit a demand in writing shall be served upon the employer and upon the employee for the excess above the amount herein exempted. Such service shall be had upon the employer, either by delivering a copy of such demand to the employer, or by leaving a copy thereof at the usual place of business of such employer with his or its superintendent, manager, cashier, general agent or clerk. And such service shall be had upon the employee either by delivering a copy of such demand to such employee, or by leaving a copy thereof at his usual place of abode with some person of his family of the age of ten years or upwards, and informing such persons of the contents thereof. Such copies for the employer and employee shall have endorsed thereon the time of service upon them, which shall be at least twenty-four hours previous to bringing suit. Such notice shall be filed with the Justice or clerk of the court, with the manner and time of the service of the same endorsed thereon, and the return duly sworn to before some officer authorized to administer oaths, before it shall be lawful to issue a summons in such case, or to require an employer to answer in any garnishee proceedings. Any judgment rendered without said demand being served upon the employee, and so proven and filed as aforesaid, shall be void. The excess of wages or salary or commission or profit allowances shall be held by the employer, subject to garnishment by the creditor serving demand, for five (5) days after such service of demand."

While many grounds are urged for the reversal of the judgment it is necessary to determine only whether plaintiff's method of serving the wage demands upon the employer was in conformity with the provisions of the foregoing statute.

It will be noted that the statute provides that "the excess



of wages or salary or commission or profit allowances shall be held by the employer, subject to garnishment by the creditor serving demand" only "for five (5) days after such service of demand." It will be further noted that what plaintiff sought to do herein was to circumvent this provision of the statute by serving a new wage demand upon the employer on or before the fifth day after the previous wage demand had been served upon it and thus prevent such employer from paying to the employee any money which might have accrued to the latter's benefit from the date of the original wage demand until five days after the date of the final wage demand. In other words plaintiff sought to compel the employer to hold subject to garnishment any money that might accrue to the employee from January 26, 1940, when the first wage demand was served on the employer, until April 21, 1940, which was five days after the final wage demand of April 16, 1940. If plaintiff's method of serving wage demands were permissible the employee's salary or other money accruals due him as specified in the statute might be tied up indefinitely by superimposing wage demand upon wage demand until plaintiff made up his mind to procure his garnishment writ. No such procedure was contemplated by the legislature when it enacted section 14 of the Garnishment Act. The language in that section that "the excess of wages or salary or commission or profit allowances shall be held by the employer, subject to garnishment by the creditor serving demand, for five \*\*\* days after such service of demand" is plain and unambiguous and therefore not open to construction. It expressly states that an employer properly served with a demand in garnishment shall only be bound to hold subject to garnishment funds in his hands due and owing to his employee for five days after the service of such demand. Thus the creditor is precluded under the statute from superimposing successive wage demands, one upon the other, as a basis for the issuance of a garnishment writ.

of wages or salary or commission or profit allowance shall be held by the employer, and not be subject to garnishment for the payment of a money demand, until five days after such service of demand. It will be sufficient to state that what is intended is to do herein was to determine the provision of the statute by a ruling a new wage demand upon the employer on or before the fifth day after the previous wage demand had been served upon it and thus prevent such employer from paying to the employee any money which might have been due to the latter's benefit from the date of the original wage demand until five days after the date of the final wage demand. In other words, it is to be noted to compel the employer to hold and to garnishment any money that might accrue to the employee from January 1, 1941, to the final wage demand was served on the employer, and until July 1, 1940, which was five days after the final wage demand of April 1, 1940. It is plaintiff's method of serving wage demands here to satisfy the employee's salary or other money payable but not as a condition in the statute might be held by the plaintiff by garnishment wage demand upon wage demand until plaintiff's demand on his mind to procure his garnishment writ. He such procedure was contemplated by the legislature when it enacted section 14 of the Garnishment Act. The language in that section that "the excess of wages or salary or commission or profit allowance shall be held by the employer, and not be garnishment by the creditor serving demand, for five days after such service of demand" is plain and unambiguous and therefore not open to construction. It is only states that an employer properly serves with a demand in garnishment shall only be bound to hold subject to garnishment funds in his hands due and owing to his employee for five days after the service of such demand. Thus the statute is in divided nature the statute from superseding successive wage demands, one demand the other, as a basis for the issuance of a garnishment writ.

such as were made here  
The statute makes no provision for a succession of wage demands/ as the basis for the issuance of a summons in garnishment but does provide merely for a single wage demand as one of the prerequisites for the institution of a garnishment proceeding. The wage demand specified in the statute is without force and absolutely ineffective for any purpose after the expiration of five days from the date of its service and plaintiff's chain system of serving wage demands could not avail him to keep any single demand alive for more than five days because the statute authorized no such procedure. It is not surprising that plaintiff was unable to find any authority which construed the provision of section 14 under consideration. The reason for his inability in this regard is undoubtedly due to the fact that said provision of the statute is so clear that it never before occurred to anyone to question it or to evolve any such unique method of service of wage demands as plaintiff resorted to in this case. Therefore if plaintiff was otherwise entitled to a garnishment writ against defendant garnishee, its issuance could have been based only upon the last wage demand made upon it on April 16, 1940, and it clearly appears from the stipulated facts that defendant garnishee was not indebted to its employee Alvin F. Eitelgeorge for salary, wages, commission or profit allowances April 16, 1940, when the last demand was made, April 19, 1940, when the garnishment writ issued, or on April 22, 1940, when the garnishee filed its answer.

For the reasons stated herein the judgment of the Superior court is reversed and judgment is entered here in favor of the garnishee defendant and against plaintiff.

JUDGMENT REVERSED AND JUDGMENT  
HERE IN FAVOR OF GARNISHEE  
DEFENDANT AND AGAINST PLAINTIFF.

Scanlan, P. J., and Friend, J., concur.

such as were made here  
 The statute makes no provision for a cessation of wage demands  
 as the basis for the issuance of a summons in garnishment but  
 does provide merely for a single wage demand as one of the  
 prerequisites for the institution of a garnishment proceeding.  
 The wage demand specified in the statute is without force and  
 absolutely ineffective for any purpose after the expiration of  
 five days from the date of its service and plaintiff's claim  
 system of serving wage demands could not avail him to keep any  
 single demand alive for more than five days beyond the statute  
 authorized no such procedure. It is not surprising that plaintiff  
 was unable to find any authority which constituted the provision  
 of section 14 under consideration. The reason for this inability  
 in this regard is undoubtedly due to the fact that said provision  
 of the statute is so clear that it never before occurred to anyone  
 to question it or to evolve any such unique method of service of  
 wage demands as plaintiff resorted to in this case. Therefore  
 if plaintiff was otherwise entitled to a garnishment writ against  
 defendant garnishee, its issuance could have been based only upon  
 the last wage demand made upon it on April 16, 1940, and it clearly  
 appears from the stipulated facts that defendant garnishee was not  
 indebted to its employee Alvin H. Wittelsohn for salary, wages,  
 commission or profit allowances April 16, 1940, when the last  
 demand was made, April 19, 1940, when the garnishment writ issued,  
 or on April 22, 1940, when the garnishment filed its answer.  
 For the reasons stated herein the judgment of the Superior  
 court is reversed and judgment is entered here in favor of the  
 garnishee defendant and against plaintiff.

FOR THE PLAINTIFF: ALVIN H. WITTELSON  
 BY: [Name] ATTORNEY  
 FOR THE DEFENDANT: [Name] ATTORNEY



41970

HELEN S. ASHER,  
Appellant,

v.

LUCIUS TETER, JOHN R. FUGARD  
and EDWARD L. VOLLERS, indi-  
vidually and as trustees under  
Stock Trust Agreement, dated  
as of October 15, 1936, with  
5332 BLACKSTONE, Inc., an  
Illinois corporation, and  
LAKE SHORE TRUST & SAVINGS  
BANK, a corporation,  
Appellees.

90  
APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

314 I.A. 200

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Helen S. Asher, the owner of stock trust certificates for 10 shares out of 1,087 shares of the capital stock of 5332 Blackstone, Inc., filed her complaint on May 12, 1941 for an injunction to restrain the defendants, Lucius Teter, John R. Fugard and Edward L. Vollers, individually and as trustees under a certain stock trust agreement, 5332 Blackstone, Inc., and the Lake Shore Trust & Savings Bank, the depository and agent of said stock trustees, from selling the apartment building owned by the defendant corporation. The complaint also prayed for other relief as will hereinafter appear. Plaintiff's motion for a temporary injunction to restrain the consummation of the sale was denied May 13, 1941. On defendants' motion an order was entered June 13, 1941, dismissing plaintiff's complaint for want of equity. Immediately thereafter, on the same day, plaintiff's motion for leave to file an amended complaint was denied. Plaintiff appeals from the orders dismissing her complaint and denying her leave to file an amended complaint.

Plaintiff's complaint is as follows:

"1. That she is the holder and owner of stock trust certificates for ten shares of capital stock of 5332 Blackstone, Inc., an Illinois corporation, which certificates have been duly issued by Lake Shore Trust & Savings Bank, a corporation of

HELEN S. ASHER, Plaintiff,

vs.  
 LUCIUS TETER, JOHN R. FUGARD  
 and EDWARD L. VOLFFERS, Individually and as trustees under  
 Stock Trust Agreement dated  
 as of October 12, 1941, with  
 2332 BLACKSTONE, Inc., an  
 Illinois corporation, and  
 LAKE SHORE TRUST & SAVINGS  
 BANK, a corporation.  
 Defendants.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Helen S. Asher, the owner of stock trust certificates for 10 shares out of 1,087 shares of the capital stock of 2332 Blackstone, Inc., filed her complaint on May 12, 1941 for an injunction to restrain the defendants, Lucius Teter, John R. Fugard and Edward L. Volffers, individually and as trustees under a certain stock trust agreement, 2332 Blackstone, Inc., and the Lake Shore Trust & Savings Bank, the depository and agent of said stock trustees, from selling the apartment building owned by the defendant corporation. The complaint also prayed for other relief as will hereinafter appear. Plaintiff's motion for a temporary injunction to restrain the summation of the sale was denied May 13, 1941. On defendants' motion an order was entered June 13, 1941, dismissing plaintiff's complaint for want of equity. Immediately thereafter, on the same day, plaintiff's motion for leave to file an amended complaint was denied. Plaintiff's sale from the orders dismissing her complaint and denying her leave to file an amended complaint.

Plaintiff's complaint is as follows:

"1. That she is the holder and owner of stock trust certificates for ten shares of capital stock of 2332 Blackstone, Inc., an Illinois corporation, which certificates have been duly issued by Lake Shore Trust & Savings Bank, a corporation of

Chicago, as depository and agent of the stock trustees under Stock Trust Agreement dated as of October 15, 1936, by and between 5332 Blackstone, Inc., a corporation, and Dayton Keith, Arthur F. Mohl, C. S. Tuttle, and their successors and substitutes as stock trustees and the holders of stock trust certificates.

"2. Plaintiff files this complaint on her own behalf and on behalf of all other holders of trust certificates for capital shares of 5332 Blackstone, Inc., a corporation, for the purpose of enjoining and restraining the sale of the property and assets of 5332 Blackstone, Inc., a corporation, under notice issued by the defendants stock trustees under date of April 21, 1941, and for the further purpose of seeking an accounting from the defendants and among other things that if the property should be sold, it may be sold to the highest and best bidder available without limitation, restriction or stifling of competition in order that the best possible price may be obtained for the benefit of plaintiff and of all other trust certificate holders.

"3. That Lucius Teter, John R. Fugard and Edward L. Vollers, claiming to act as successor trustees under said trust agreement, are in control of all of the shares of the capital stock of 5332 Blackstone, Inc., a corporation, and of the election and appointment of the directors and officers thereof.

"4. That the said stock trustees are in a fiduciary capacity for and on behalf of plaintiff and of all other holders of stock trust certificates issued pursuant to said stock trust agreement.

"5. That under date of April 21, 1941, the said Lucius Teter, John R. Fugard and Edward L. Vollers, stock trustees, issued a notice of offer to purchase property, wherein they advised plaintiff and the holders of trust certificates of capital stock of 5332 Blackstone, Inc., a corporation, that the corporation had received an offer to buy the land, building and personal property owned by it and located at 5332 Blackstone Avenue, consisting of land frontage of fifty feet on Blackstone Avenue with a depth of one hundred fifty feet and improved with a three-story basement brick and stone building of the corridor type containing nine three-room apartments, three two and one-half-room apartments, sixteen two-room apartments and fifteen one and one-half-room apartments; and that the building is approximately fifteen years old and is furnished with average furnishings. They stated further that a contract had been entered into between the proposed purchaser, Benjamin Melmed, one of the present lessees of the property, and that said contract had been entered into between the said purchaser and the trustees of 5332 Blackstone, Inc., a corporation.

"6. Said notice stated that the contract provides for the payment in cash of the sum of Fifty-seven Thousand Dollars (\$57,000) as the full purchase price, but that the company is to pay brokerage commission of Twenty-seven Hundred Ten Dollars (\$2710) if the sale is completed.

"7. Said notice stated further:

"As your trustees we have given careful thought to the question of the advisability of selling the property. We have

Chicago, as depository and agent of the stock trustees under Stock Trust Agreement dated as of October 12, 1938, by and between J332 Blackstone, Inc., a corporation, and Dayton Kettler, Arthur F. Mohl, C. S. Tuttle, and their successors and assigns as stock trustees and the holders of stock trust certificates.

"2. Plaintiff files this complaint on her own behalf and on behalf of all other holders of trust certificates for capital shares of J332 Blackstone, Inc., a corporation, for the purpose of enforcing and restraining the sale of the property and assets of J332 Blackstone, Inc., a corporation, under notice issued by the defendants stock trustees under date of April 21, 1941, and for the further purpose of seeking an accounting from the defendants and among other things that if the property should be sold, it may be sold to the highest and best bidder available without limitation, restriction or stalling of competition in order that the best possible price may be obtained for the benefit of plaintiff and of all other trust certificate holders.

"3. That Lucius Teter, John R. Fugard and Edward L. Voliers, claiming to act as successor trustees under said trust agreement, are in control of all of the shares of the capital stock of J332 Blackstone, Inc., a corporation, and of the election and appointment of the directors and officers thereof.

"4. That the said stock trustees are in a fiduciary capacity for and on behalf of plaintiff and of all other holders of stock trust certificates issued pursuant to said stock trust agreement.

"5. That under date of April 21, 1941, the said Lucius Teter, John R. Fugard and Edward L. Voliers, stock trustees, issued a notice of offer to purchase property wherein they advised plaintiff and the holders of trust certificates of capital stock of J332 Blackstone, Inc., a corporation, that the corporation had received an offer to buy the land, building and personal property owned by it and located at J332 Blackstone Avenue, consisting of land frontage of fifty feet on Blackstone Avenue with a depth of one hundred fifty feet and improved with a three-story basement brick and stone building of the corridor type containing nine three-room apartments, three two and one-half-room apartments, sixteen two-room apartments and fifteen one and one-half-room apartments; and that the building is approximately fifteen years old and is furnished with average furnishings. They stated further that a contract had been entered into between the proposed purchaser, Benjamin Melmed, one of the present lessees of the property, and that said contract had been entered into between the said purchaser and the trustees of J332 Blackstone, Inc., a corporation.

"6. Said notice stated that the contract provided for the payment in cash of the sum of fifty-seven thousand dollars (\$57,000) as the full purchase price, but that the company is to pay brokerage commission of twenty-seven hundred ten dollars (\$2,710) if the sale is completed.

"7. Said notice stated further:

"As your trustees we have given careful thought to the question of the advisability of selling the property. We have

determined to recommend the proposal to you for acceptance because it is our belief that this offer is a fair and reasonable offer at the present time. Naturally, we are in no position to foretell whether or not a higher price could be obtained in future years.

"The Stock Trust Agreement under which your shares are held provides that the trustees may not cause the sale of the property if certificate holders owning 33-1/3% of the shares of the corporation object in writing. Accordingly, this is to notify you that if less than 33-1/3% of the shares object to the proposed sale in writing prior to May 12, 1941, the sale will be approved and we will authorize it to be consummated in your behalf. If 33-1/3% or more of the shares object to the proposed sale in writing prior to May 12, 1941, we will not cause the sale to be completed. If an offer of more than \$57,000 is received from another prospective purchaser prior to May 12, 1941, your company has the right to accept the highest offer unless the original offeror agrees to meet the higher proposal. Therefore, approval of the terms of the proposed sale shall be considered approval of offers at a higher figure."

"That said notice further states that the corporation obtained an appraisal by William A. Lieghly, a professional appraiser, and that his report states that in his opinion the fair market value of the property (land, building and equipment) as of March 6, 1941, is Sixty Thousand Dollars (\$60,000); that in said appraisal the furnishings in the building as depreciated are valued at approximately Eight Thousand Dollars (\$8,000); that said notice further states that the County Assessor has determined in connection with the 1939 real estate taxes that the full value of the land and building is Fifty-nine Thousand Seven Hundred Dollars (\$59,700); that, of course, this valuation is exclusive of the value of the furnishings and personal property in the building which belong to the corporation and which were valued by Mr. Leighly at about Eight Thousand Dollars (\$8,000).

"5. That the proposed purchaser is one of the lessees of the property who had been leasing the premises including the furnishings at a monthly rental of Six Hundred Dollars (\$600) under lease which expired on April 30, 1940; that prior thereto, the stock trustees negotiated a three-year extension of the term with an increase in rental to Six Hundred Seventy-five Dollars (\$675) per month; that said lease further provides that the lessee shall pay thirty-three and one-third per cent (33-1/3%) of the gross income per month over Nineteen Hundred Dollars (\$1900); that the said lessee has been reporting a gross income of approximately \$1750 per month; that the said lease is cancellable in the event of sale of the property by the corporation.

"6. That the stock trustees did not notify the shareholders that the said lease was thus cancellable in the event of sale; that in the annual report of the 5332 Blackstone, Inc., a corporation, for the year ending September 30, 1940, issued under date of December 18, 1940, by the stock trustees, it appears that the first mortgage reorganization loan at interest of five per cent (5%) per annum required semi-annual payments of \$625 on May 1st and November 1st of each year, and a final payment of \$19,375 on November 1, 1941, that in said annual report the stock trustees further notified the holders of trust certificates that the 1939 real estate tax bill amounted to \$2,862.28 or an increase of \$829.52 over the 1938 bill; that the stock trustees caused proper objections to be filed, and as a result obtained a reduction of \$848.96; that the

determined to recommend the proposed to you for acceptance because it is our belief that this offer is a fair and reasonable offer at the present time. Naturally, we are in no position to forecast whether or not a higher price could be obtained in future years.

"The Stock Trust agreement under which your shares are held provides that the trustees may not cause the sale of the property if certificates held by the corporation are less than 33-1/3% of the shares of the corporation except in writing. Accordingly, this is to notify you that if less than 33-1/3% of the shares of the proposed sale in writing prior to May 12, 1941, the sale will be approved and we will authorize it to be consummated in your behalf. If 33-1/3% or more of the shares of the proposed sale in writing prior to May 12, 1941, we will not cause the sale to be completed. If an offer of more than \$27,000 is received from another prospective purchaser prior to May 12, 1941, your company has the right to accept the highest offer which the original offer agrees to meet the higher proposal. Therefore, approval of the terms of the proposed sale will be considered approval of the terms of the proposed sale at a higher figure."

"That said notice further states that the corporation obtained an appraisal by William A. McGilly, a professional appraiser, and that his report states that in his opinion the fair market value of the property (land, building and equipment) as of March 6, 1941, is sixty thousand dollars (\$60,000); that in said appraisal the furnishings in the building are depreciated and valued at approximately thirty thousand dollars (\$30,000); that said notice further states that the County Assessor has determined in connection with the 1939 real estate taxes that the full value of the land and building is fifty-nine thousand seven hundred dollars (\$59,700); that, of course, this valuation is exclusive of the value of the furnishings and personal property in the building which belong to the corporation and which were valued by Mr. McGilly at about eight thousand dollars (\$8,000).

"That the proposed purchaser is one of the lessees of the property who had been leasing the premises including the furnishings at a monthly rental of six hundred dollars (\$600) under lease which expired on April 30, 1940; that prior thereto, the stock trustees negotiated a three-year extension of the term with an increase in rental to six hundred seventy-five dollars (\$675) per month; that said lease further provided that the lessee shall pay thirty-three and one-third per cent (33-1/3%) of the gross income per month over fifteen hundred dollars (\$1500); that the said lessee has been reporting a gross income of approximately \$1750 per month; that the said lease is cancellable in the event of sale of the property by the corporation.

"That the stock trustees did not notify the shareholders that the said lease was then cancellable in the event of sale; that in the annual report of the "Blackstone, Inc., a corporation, for the year ending September 30, 1940, issued under date of December 18, 1940, by the stock trustees, it appears that the first mortgage reorganization loan at interest of five per cent (5%) per annum required semi-annual payments of \$625 on May 1st and November 1st of each year, and a final payment of \$12,375 on November 1, 1941, that in said annual report the stock trustees further notified the holders of trust certificates that the 1939 real estate tax bill amounted to \$2,862.28 or an increase of \$625.28 over the 1938 bill; that the stock trustees caused proper objections to be filed, and as a result obtained a reduction of \$848.96; that the

1939 assessed valuation of \$59,700 is the figure obtained after securing said deduction from the original assessed valuation of approximately \$84,000 as originally determined by the County Assessor.

"7. That in the notice of offer to purchase the property dated April 21, 1941, the stock trustees estimated the payments to be made out of the proceeds of sale and include therein, among others, the following items:

|                                                                                      |             |
|--------------------------------------------------------------------------------------|-------------|
| First Mortgage Loan .....                                                            | \$20,000.00 |
| Cost of retiring first mortgage loan....                                             | 750.00      |
| Brokerage commission to Morris B. DeWoskin & Co.....                                 | 2,710.00    |
| Fees of stock trustees for services in connection with the sale and dissolution..... | 525.00      |
| Fees of attorneys in connection with the sale and dissolution.....                   | 600.00      |
| Sundry expenses.....                                                                 | 200.00      |

"8. That said notice of April 21, 1941, further contained the statement by the stock trustees that the net earnings of the property before charging depreciation or financing and administrative expenses amount at present to approximately \$5,650 per year on the basis of the present net lease whereunder only the minimum rental has been paid by the lessee, the proposed purchaser; that under said net lease the lessee is required to maintain the furnishings and equipment in the building in good condition.

"9. That the said 5332 Blackstone, Inc., a corporation, has paid liquidating dividends of One Dollar per share per year for the years of 1937, 1938 and 1939, and in 1940 paid a liquidating dividend of One Dollar and Twenty-five Cents per share; that on September 30, 1940, the annual report showed cash on hand of \$4867.33, and that as of April 1, 1941, cash on hand was \$5,237.99. There are Ten Hundred Eighty-seven (1087) shares issued and outstanding.

"10. Plaintiff represents that neither the stock trustees nor the corporation solicited or secured any other offers for the purchase of the building and the furnishings involved; that the granting of the contract to the present lessee with a condition that said lessee should have the right to meet any higher proposal, definitely stifles competition and prevents any interested prospective purchaser from bidding or attempting to purchase the property involved; that in considering the valuation of the property and of the furnishings and of its earnings, and further considering the improving renting conditions in the City of Chicago and in the neighborhood of the building in particular, and further considering the general improved market in regard to real estate in the City of Chicago, the price offer of \$57,000 is insufficient and inadequate.

"11. That it was the duty of the stock trustees to solicit offers for the purchase of this property publicly and to canvass the many operators of hotels and apartment buildings in order to attempt to secure the highest and best possible offer for the purchase of the property.

"12. That the stock trustees were derelict in their



1939 assessed valuation of \$2,700 is the figure obtained after assessing said valuation from the original assessed valuation of approximately \$34,000 as originally determined by the County Assessor.

"7. That in the notice of offer to purchase the property dated April 21, 1941, the stock trustees advised the payee to be made out of the proceeds of sale and interest thereon, among others, the following items:

|                                                                                       |             |
|---------------------------------------------------------------------------------------|-------------|
| First Mortgage Loan .....                                                             | \$20,000.00 |
| Cost of retaining first mortgage loan .....                                           | 750.00      |
| Brokerage commission to Morris W. Deakin & Co. ....                                   | 2,700.00    |
| Fees of stock trustees for services in connection with the sale and dissolution ..... | 125.00      |
| Fees of attorneys in connection with the sale and dissolution .....                   | 600.00      |
| General expenses .....                                                                | 100.00      |

"8. That said notice of April 21, 1941, further contained the statement by the stock trustees that the net earnings of the property before charging depreciation on furnishings and administrative expenses amount to approximately \$2,000 per year on the basis of the present net lease whereby only the minimum rental has been paid by the lessee, the proposed purchase; that under said net lease the lessee is required to maintain the furnishings and equipment in the building in good condition.

"9. That the said 2332 Blackstone, Inc., a corporation, has paid liquidating dividends of One Dollar per share per year for the years of 1937, 1938 and 1939, and in 1940 paid a liquidating dividend of One Dollar and Twenty-five Cents per share; that on September 30, 1940, the annual report showed cash on hand of \$487.33, and that as of April 1, 1941, cash on hand was \$5,237.99. There are Ten Hundred Eighty-seven (1087) shares issued and outstanding.

"10. Plaintiff represents that neither the stock trustees nor the corporation solicited or secured any other offers for the purchase of the building and the furnishings involved; that the granting of the contract to the present lessee with a condition that said lessee should have the right to lease any higher priced, definitely attires competition and prevents any interested prospective purchaser from bidding or attempting to purchase the property involved; that in considering the valuation of the property and of the furnishings and of its earnings, and further considering the improving renting conditions in the city of Chicago and in the neighborhood of the building in particular, and further considering the general improved market in regard to real estate in the City of Chicago, the price offer of \$25,000 is insufficient and inadequate.

"11. That it was the duty of the stock trustees to solicit offers for the purchase of this property publicly and to canvas the many operators of hotels and apartment buildings in order to attempt to secure the highest and best possible offer for the purchase of the property.

"12. That the stock trustees were derelict in their



granting a contract to the present lessee with a stipulation that he would have the privilege and option to meet any higher proposal and thus to limit bidding; that it was the duty of the stock trustees to encourage bidding and to stimulate competitive offers; that in the annual report issued December 18, 1940, the stock trustees requested the certificate holders to vote in favor of the continuance of the stock trust, and stated that many of the certificate holders live away from Chicago, and, therefore, the stock trustees could best serve their interest in the handling of the property and in the continuous functioning of the corporation; that the list of holders of trust certificates is not known or available to any individual trust certificate holder, and that, therefore, concerted or united action by said trust certificate holders is prevented.

"13. That under the circumstances plaintiff brings this suit for and on behalf of herself and of all other holders of stock certificates for capital stock of 5332 Blackstone, Inc., a corporation, under the said stock Trust Agreement dated as of October 15, 1936.

"14. That among other things plaintiff represents that even if the present proposed purchase and sale should be consummated, the stock trustees are not properly authorized or empowered to permit a reduction from the proceeds of sale of the alleged brokerage commission or of the cost of retiring the first mortgage loan or arbitrarily to set the fees as estimated by them; that the relationship between the stock trustees of the corporation and the lessee was sufficiently close at all times so that no broker was necessary or required and that no brokerage commission is properly payable; that the original first mortgage loan would not have matured until November 1, 1941, and that the certificate holders should not be penalized in an amount of Seven Hundred Fifty Dollars (\$750) or in any substantial amount for the cost of retiring said loan or any refinancing thereof; that under the circumstances, the failure of the stock trustees to solicit the best possible price for the sale of the premises and for the best interests of the certificate holders should prevent them from receiving any fees for their services in connection with the sale and dissolution.

"15. The plaintiff is convinced that if the property were offered for sale to the highest and best bidder without any restrictions as attached in the notice of sale dated April 21, 1941, that a much higher price could be realized for the certificate holders than the claimed net price (after the deduction of the alleged brokerage commission).

"16. Because the certificate holders are widely scattered and many of them reside outside the City of Chicago and are unfamiliar with conditions in the City, and because of the inability of said certificate holders to act as a unit and to communicate with each other, and because of the onesided nature of the contract entered into between the stock trustees, the corporation and the proposed purchaser, and because of the failure of the stock trustees to disclose all of the available information to the trust certificate holders, and because of the stock trustees' failure to publicly advertise or solicit bids and offers for the purchase of the property, it is impossible to obtain objections from thirty-three and one-third per cent (33-1/3%) of the trust certificate holders and to prevent the consummation of the said sale except by the filing of this complaint and by the intervention of a court of equity under the circumstances.



"17. That plaintiff and the other widely scattered trust certificate holders, who do not know each other and cannot communicate with each other, have no adequate remedy at law.

"Wherefore, plaintiff prays as follows:

"(1) That the defendants and each of them be restrained and enjoined from proceeding with the sale of the property, land, building and personal property owned by the 5332 Blackstone Inc., a corporation, and from accepting the alleged contract with Benjamin Melmed for the purchase of the property in the sum of Fifty-seven Thousand Dollars (\$57,000) less brokerage commission;

"(2) That the defendants account for all their acts and doings in the circumstances and for any disbursements made or to be made in connection with said offer of purchase.

"(3) That the said defendants, stock trustees, be removed as stock trustees and officers and directors of the said 5332 Blackstone, Inc., a corporation, and that the court appoint new stock trustees to act under said Stock Trust Agreement dated as of October 15, 1936, and appoint any new officers and directors of said 5332 Blackstone, Inc., a corporation, or, in the alternative, that the court order an election by the holders of trust certificates to select new stock trustees and officers and directors.

"(4) That the court assume jurisdiction and direct the public solicitation of offers to purchase the property of 5332 Blackstone, Inc., a corporation, and that the highest and best bidder may acquire the property and that competition be encouraged instead of being stifled and limited.

"(5) That the defendant Lake Shore Trust and Savings Bank, a corporation, may be restrained and enjoined from notifying the proposed purchaser of the result of the voting of the trust certificate holders or from in any manner assisting in the consummation of the alleged contract with said proposed purchaser.

"(6) That the court investigate the acts and doings of the stock trustees and the other defendants, and compel them to bring into court for audit, examination and investigation all of their books, documents and records of every kind, nature and description in any way bearing upon or relating to the situation described in the complaint as well as for any other purposes pertinent to the present proceeding, and including among the documents, the stock trust agreement, the alleged contract of purchase, notices sent to the trust certificate holders, audits and statements of the lessees, the net lease of the premises, and the audits and statements of the corporation.

"(7) That the court may restrain and enjoin the defendants and their agents, employees and attorneys from proceeding with or from consummating the offer of purchase mentioned in the notice dated April 21, 1941, and from taking any other action in connection with the property of 5332 Blackstone, Inc., a corporation, until the further order of court.

"(8) And that the court may grant such other and further relief in the premises as the court may deem proper and as equity may require for the aid and assistance of the plaintiff, and of all other holders of trust certificates of capital shares of stock of 5332 Blackstone, Inc., a corporation."

"17. That plaintiff and two other widely scattered trust certificate holders, who do not have each other and cannot communicate with each other, have no ability remedy as law."

"Wherefore, plaintiff prays as follows:

"(1) That the defendants and each of them be restrained and enjoined from proceeding with the sale of the property in building and personal property owned by the Blackstone Trust, a corporation, and from acquiring the said property in the name of Benjamin Melamed for the purpose of the property in the sum of Fifty-seven thousand dollars (\$57,000) less broker's commission."

"(2) That the defendants account for all their acts and doings in the circumstances and for any hindrances made or to be made in connection with said offer of purchase."

"(3) That the said defendants, stock trustees, be removed as stock trustees and officers and directors of the said Blackstone, Inc., a corporation, and that the court appoint new stock trustees to act under said stock trust agreement dated as of October 15, 1936, and appoint any new officers and directors of said Blackstone, Inc., a corporation, or, in the alternative, that the court order an election by the holders of trust certificates to select new stock trustees and officers and directors."

"(4) That the court assume jurisdiction and direct the public solicitation of offers to purchase the property of Blackstone, Inc., a corporation, and that the plaintiff and defendant may acquire the property and that competition be encouraged instead of being stifled and limited."

"(5) That the defendants take share Trust and Savings Bank, a corporation, may be restrained and enjoined from modifying the proposed purchase of the result of the voting of the trust certificates holders or from in any manner assisting in the consummation of the alleged contract with said proposed purchaser."

"(6) That the court investigate the acts and doings of the stock trustees and the other defendants, and compel them to bring into court for audit, examination and investigation all of their books, documents and records of every kind, nature and description in any way bearing upon or relating to the situation described in the complaint as well as for any other purposes pertinent to the present proceeding, and including among the documents, notices sent to the first certificate holders, audits and statements of the lessees, the net lease of the premises, and the audits and statements of the corporation."

"(7) That the court may restrain and enjoin the defendants and their agents, employees and attorneys from proceeding with or from consummating the offer of purchase mentioned in the notice dated April 21, 1941, and from taking any other action in connection with the property of Blackstone, Inc., a corporation, until the further order of court."

"(8) And that the court may grant such other and further relief in the premises as the court may deem proper and as equity may require for the aid and assistance of the plaintiff, and of all other holders of trust certificates of capital shares of stock of Blackstone, Inc., a corporation."

The principal grounds urged in support of defendants' motion to dismiss the complaint were as follows:

"1. The primary relief prayed for in the complaint is that the court enjoin the defendants from consummating the proposed sale of the property of 5332 Blackstone, Inc., a corporation. All other relief prayed for in the complaint is premised upon the issuance of such injunction.

"2. The plaintiff heretofore presented to the court a motion for interlocutory injunction, based on her complaint, and upon hearing of said motion the court denied the motion.

"3. To permit the pendency of plaintiff's complaint debars consummation of the proposed sale of the property of 5332 Blackstone, Inc., and in practical effect operates as an injunction against consummation of sale, to the great injury of the certificate holders of the corporation."

Plaintiff's theory, as stated in her brief, is that "the complaint stated a good cause of action and that the Court should have granted the motion for an interlocutory injunction. Nevertheless, the denial of said motion did not affect the merits of plaintiff's complaint and was in effect only a statement by the Court that the injunction was not necessary to preserve the status quo. Furthermore, the complaint set forth a good cause of action for an accounting by the defendants of all of their acts and doings, and in particular of any disbursements made by them or to be made by them in connection with the proposed sale and in refinancing of the property. The Trustees are not entitled to pay any commission to any alleged brokers for a proposed sale to their tenant. The complaint stated a good cause of action for the reason that the Trustees were attempting to sell the property without soliciting any other offers and without advertising and were attempting to stifle competition instead of fulfilling their duties as fiduciaries to obtain the best price possible for the

The principal grounds urged in support of a writ of

motion to dismiss the complaint were as follows:

"1. The primary relief prayed for in the complaint is

that the court enjoin the defendants from commencing the proposed

sale of the property of RJSS Blackstone, Inc., a corporation.

All other relief prayed for in the complaint is granted upon the

issuance of such injunction.

"2. The plaintiff heretofore presented to the court a

motion for interlocutory injunction, based on her complaint, and

upon hearing of said motion the court denied the motion.

"3. To permit the pendency of plaintiff's complaint to

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complaint stated a good cause of action and that the Court should

have granted the motion for an interlocutory injunction. Never-

theless, the denial of said motion did not affect the merits of

plaintiff's complaint and was in effect only a statement of the

Court that the injunction was not necessary to preserve the statu-

quo. Furthermore, the complaint set forth a good cause of action

for an accounting by the defendants of all of their notes and

debt, and in particular of any disbursements made by them or to

be made by them in connection with the proposed sale and in

refinancing of the property. The trustees are not entitled to

pay any commission to any alleged brokers for a proposed sale to

their tenant. The complaint stated a good cause of action for the

reason that the trustees were attempting to sell the property

without soliciting any other offers and without advertising and

were attempting to stifle competition instead of willing their

debt as trustees to obtain the best price possible for the

trust property.

"It is the plaintiff's theory that the defendant's motion to dismiss was not well founded in point of law. However, even if it should have been, the Court was in duty bound to grant plaintiff leave to amend the complaint, and the action of the Court in denying leave to amend was arbitrary and capricious."

Defendants state their position as follows: "Upon denial of an injunction restraining the sale, there remained nothing of plaintiff's complaint except the allegations of paragraph 14, viz.: that the stock trustees had no authority to pay out of the proceeds of the sale (a) brokerage commission, (b) cost of retiring first mortgage loan, (c) trustees' fees, (d) attorney's fees. No facts are alleged in plaintiff's complaint tending to show that said contemplated expenditures were unauthorized or improper; either that the Melmed offer was not actually procured by a broker, entitled to commission; or that under the terms of the loan agreement the first mortgage loan could have been retired without charge; or that the trustees' fees and attorneys' fees were not authorized by the stock trust agreement, or that said fees were unreasonable in amount."

It will be noted that except for the allegations contained in par. 14 of plaintiff's complaint the purpose of such complaint is to secure injunctive relief against the sale of the corporate property and other relief incidental thereto. Paragraph 14 assumes to state equitable grounds for an accounting, but it is readily apparent that the allegations contained therein are insufficient and furnish no proper basis for an accounting. As to the brokerage commission of \$2,710 payable to Morris B. DeWoskin & Co., referred to therein, the complaint states no facts showing that such commission was not actually earned by the broker, that the sale could be consummated without legal liability on the part of the

trust property.

"It is the plaintiff's theory that the defendant's action to disburse was not well founded in point of law. However, even if it should have been, the Court was in duty bound to grant plaintiff leave to amend the complaint, and the action of the Court in denying leave to amend was arbitrary and capricious."

Defendants state their position as follows: "Upon denial of an injunction restraining the sale, there remained nothing of plaintiff's complaint except the allegations of paragraph 14, viz.: that the stock trustees had no authority to pay out of the proceeds of the sale (a) brokerage commission, (b) cost of returning first mortgage loan, (c) trustees' fees, (d) attorney's fees. No facts are alleged in plaintiff's complaint tending to show that said contemplated expenditures were unauthorized or improper; either that the Melmed offer was not actually procured by a broker, entitled to commission; or that under the terms of the loan agreement the first mortgage loan could have been raised without charges; or that the trustees' fees and attorneys' fees were not authorized by the stock trust agreement, or that said fees were unnecessary in amount."

It will be noted that except for the allegations contained in par. 14 of plaintiff's complaint the purpose of such complaint is to secure injunctive relief against the sale of the corporate property and other relief incidental thereto. Paragraph 14 assumes to state admissible grounds for an accounting, but it is readily apparent that the allegations contained therein are insufficient and furnish no proper basis for an accounting. As to the brokerage commission of \$2,710 payable to Morris D. Deosakin & Co., referred to therein, the complaint states no facts showing that such commission was not actually earned by the broker, that the sale could be consummated without legal liability on the part of the



defendant 5532 Blackstone, Inc., to pay the broker's commission or that the defendant trustees had dishonestly and fraudulently subjected said corporation to such legal liability. Neither are there any facts alleged in the complaint tending to show that the stock trustees needlessly or improperly foisted upon the corporation the payment of a real estate brokerage commission; or that the stock trustees obtained or could have obtained an offer of \$57,000 for the property from Melmed or from anyone else without the intervention of the real estate broker. In the period from April 21, 1941, when the conditional contract between the stock trustees and Melmed was announced, until June 13, 1941, when plaintiff's complaint was dismissed, she brought forth no offer of any kind, with or without commission, to compare with the Melmed offer. As to the item of \$750 for "cost of retiring first mortgage loan," no facts are alleged to show that the sale could be consummated without incurring such cost or that the defendant trustees proposed and intended to improperly or fraudulently impose such costs upon the defendant corporation. As to the fees of the trustees and their attorneys in the amounts, respectively, of \$525 and \$600 for their services in connection with the sale of the property and the dissolution of the corporation, also referred to in par. 14, it does not appear from the complaint that upon the consummation of the sale such fees would constitute an improper charge or that they were unreasonable in amount.

The balance of the complaint, as already stated, is concerned with the restraint of the sale of the property by the trustees in accordance with the terms of the contract of sale entered into between them and Melmed, which contract, from aught that appears in the record, was approved by all of the certificate holders except plaintiff. The only other relief sought was

defendant J. J. Blackstone, Inc., to pay the costs of the commission or that the defendant trustees had dishonestly and fraudulently subjected said corporation to such legal liability. Plaintiff alleges in the complaint tending to show that the stock trustees negligently or intentionally failed upon the corporation the payment of a real estate brokerage commission; or that the stock trustees obtained or could have obtained an offer of \$25,000 for the property from Melmed or from anyone else without the intervention of the real estate broker. In the period from April 21, 1941, when the conditional contract between the stock trustees and Melmed was announced, until June 13, 1941, when plaintiff's complaint was dismissed, she brought forth no offer of any kind, with or without commission, to compare with the Melmed offer. As to the item of \$750 for "cost of returning first mortgage loan," no facts are alleged to show that the sale could be consummated without incurring such cost or that the defendant trustees proposed and intended to improperly or fraudulently impose such costs upon the defendant corporation. As to the fees of the trustees and their attorneys in the amount, respectively, of \$250 and \$600 for their services in connection with the sale of the property and the dissolution of the corporation, also referred to in par. 14, it does not appear from the complaint that upon the consummation of the sale such fees would constitute an improper charge or that they were unnecessary in amount.

The balance of the complaint, as already stated, is concerned with the restraint of the sale of the property by the trustees in accordance with the terms of the contract of sale entered into between them and Melmed, which contract, from what that appears in the record, was approved by all of the certificate holders except plaintiff. The only other relief sought was

incidental to the granting of an injunction to restrain the sale.

Since, as we have heretofore pointed out, the allegations of the complaint failed to support plaintiff's prayer for an accounting, such complaint must be considered as seeking an injunction only, and since her motion for an injunction and the proceedings on said motion are not shown by the record before us on this appeal, it must be assumed that the order denying the temporary injunction was required by the case presented on the motion. In Leonard v. Garland, 157 Ill. App. 355, the court said at p. 357:

"This bill is an appeal by complainants below from the decree dismissing the bill. This appeal does not bring up for review the order denying the motion for an injunction, and, if it did, the proofs upon which that motion was heard and decided are not preserved in the record. We must therefore assume that the order denying the injunction was required by the case presented upon the hearing of that motion. The bill was for an injunction only, and the court might properly have then dismissed the bill. Titus v. Mabes, 25 Ill. 232; Goddard v. C. & N. W. Ry. Co., 202 Ill. 362. That which the court could properly have done on November 14, 1908 [when the motion for injunction was heard and denied], it did not lose the power to do by its delay in entering the dismissal [on July 7, 1929]. As the bill was for an injunction only and the court properly denied the motion for an injunction, the decree dismissing the bill must be sustained."

While the Supreme court reversed that case on other grounds in Leonard v. Garland, 252 Ill. 300, it sustained the propositions that the appeal from the order of dismissal did not carry with it an appeal from the order denying a temporary injunction; and that if it was apparent on the face of the complaint that it was without equity and could not be made good by amendment, it was proper to follow the order denying the preliminary injunction with an order dismissing the bill for want of equity. There the court said at p. 382:

"The bill was for injunction, only. Plaintiffs in error contend the motion to dismiss should be treated as a general demurrer to the bill and be denied unless the bill shows a want of equity upon its face. Whether the court erred in refusing the preliminary injunction is not involved at this time. There is no certificate of evidence in the record showing what facts were before the court on the hearing of the preliminary motion. Reasons

incidental to the granting of an injunction to restrain the sale.

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of the complaint failed to support Plaintiff's prayer for an accounting, such complaint must be considered as seeking an injunction only, and since her motion for an injunction and the proceedings on said motion are not shown by the record before us on this appeal, it must be assumed that the order denying the temporary injunction was required by the facts presented on the motion. In Leonard v. Garland, 157 Ill. App. 357, the court said

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While the Supreme court reversed that case on other grounds in Leonard v. Garland, 252 Ill. 307, it sustained the proposition that the appeal from the order of dismissal did not carry with it an appeal from the order denying a temporary injunction; and that if it was apparent on the face of the complaint that it was without equity and could not be made good by amendment, it was proper to follow the order denying the preliminary injunction with an order dismissing the bill for want of equity. There the court said at

p. 382:

"The bill was for injunction, only. Plaintiff's error contended the motion to dismiss should be treated as a general demurrer to the bill and be denied unless the bill shows a want of equity upon its face. Whether the court erred in refusing the preliminary injunction is not involved at this time. There is no certificate of evidence in the record showing what facts were before the court on the hearing of the preliminary motion. Reasons

may have existed which would justify the court in refusing the temporary injunction other than a failure of the bill to show a case for equitable relief. A motion to dissolve a temporary injunction for want of equity in the bill, under the rule established in this state, operates as a demurrer to the bill and is considered as an admission of the material allegations thereof. The decree dissolving such injunction is, in effect, a denial of the relief sought, and the bill may be at once dismissed and the action of the court reviewed on error or appeal. (Titus v. Mabee, 25 Ill. 232; Shaw v. Hill, 67 id. 455; Smith v. Kockersperger, 173 id. 201; Weaver v. Poyer, 70 id. 567; Heinroth v. Kochersperger, 173 id. 205). The same rule applies when the injunction is the only relief sought and the motion to dissolve is heard upon bill, answer and affidavits. In such case the dissolution of the injunction may be treated as a final disposition of the cause, from which an appeal will lie. (High on Injunction, sec. 1706; Prout v. Lomer, 79 Ill. 331; American Live Stock Commission Co. v. Chicago Live Stock Exchange, 143 id. 210.) The practice is similar and is followed with like results where a court denies a motion for a preliminary injunction on a bill filed only for injunctive relief, where there is no equity in the bill and it is apparent that it cannot be made good by amendments. (Thomas v. Adams, 30 Ill. 37; Vieley v. Thompson, 44 id. 9; Hummert v. Schwab, 54 id. 142; Brockway v. Rowley, 66 id. 99; Grimes v. Grimes, 143 id. 550; Canal Comrs. v. Village of East Peoria, 179 id. 214; Leonard v. Arnold, 244 id. 429.)"

It has been repeatedly held that when a complaint is filed in equity for injunctive relief only and plaintiff's motion for injunction is denied or if a preliminary injunction is granted and dissolved, dismissal of the complaint follows as a matter of course, either on the court's own motion or on the defendant's motion or on plaintiff's own motion, so that the plaintiff may proceed at once with an appeal. (Field v. Village of Western Springs, 181 Ill. 186; Goddard v. C. & N. W. Ry. Co., 202 Ill. 362; Spies v. Byers, 287 Ill. 627; and Wendt v. City of Elgin, 264 Ill. App. 433.)

In Field v. Village of Western Springs, *supra*, the court said at pp. 190, 191:

"It has been held by this court that where a bill for injunction, only, is before the court, and a temporary injunction has been granted, a motion to dissolve the injunction for want of equity has the same effect as a demurrer to the bill, and the court, on sustaining the motion to dissolve the injunction, may properly dismiss the bill, and is not required to retain the same for hearing on pleadings and proofs. (Titus v. Mabee, 25 Ill. 257; Weaver v. Poyer, 70 id. 567; Prout v. Lomer, 79 id. 331; Live Stock Commission Co. v. Live Stock Exchange, 143 id. 210.) On principle, the same rule would prevail where a bill is filed for injunction only, which, on hearing, is refused. The bill may, in such case,



be dismissed for want of equity for the same reason as in a case where a preliminary injunction has been granted and a motion has been entered to dissolve the same. In this case the bill is for injunction only, and on motion for an injunction, which is refused by the chancellor because of the want of equity in the bill, it was not error to refuse to allow the defendant to answer; nor was it error, if the bill was without equity, to dismiss the same on the refusal of the injunction."

In our opinion plaintiff's complaint did not state a good cause of action for injunctive relief. Since it does not appear from the complaint that either the trust agreement or the bylaws of the corporation provided for a sale at public auction as demanded by plaintiff rather than a sale by private negotiation, it was within the discretion of the stock trustees to choose the method of sale which in their judgment was preferable. It is not the function or policy of a court of equity to interfere with the exercise by trustees of discretionary powers conferred on them by a trust agreement so long as such powers are exercised honestly and reasonably. In the exercise of their discretion the defendant trustees entered into the contract for the sale of the corporate property to the purchaser Melmed for \$57,000, which contract contained the condition that it would not be consummated if it was objected to in writing by the holders of trust certificates for 33-1/3% or more of the shares of stock of the corporation and which also contained the further condition that the purchaser had the option to match any better offer that might be made for the property. Defendant stock trustees sent a notice to all of the certificate holders advising them fully as to the terms of the contract of sale and informing them of their right to dissent in writing within twenty days if they did not approve of the terms of the sale. The notice was sent to the certificate holders on April 21, 1941 and in so far as the record discloses none of said certificate holders dissented from the terms of the sale with the possible exception of plaintiff. Immediately upon the expiration of the twenty day period for dissents, plaintiff filed





her complaint on May 12, 1941 and notice of her motion for a temporary injunction to restrain the consummation of the sale.

Plaintiff does allege in her complaint, by way of conclusion, that the price offered by Melmed for the property was insufficient and inadequate, but from the facts alleged therein the \$57,000 sale price for the property specified in the contract seems to be fairly adequate. The primary purpose of the complaint was to restrain the sale negotiated by the stock trustees so that the property might be sold at public auction, whereby, it was alleged a better price could or might be obtained as a result of competitive bids. The difficulty with plaintiff's position in this regard is that under the stock trust agreement the trustees were permitted in the exercise of their discretion to dispose of the property at private sale and there is no showing made that the trustees abused their discretion or that the contract of sale was tainted with fraud or dishonesty. Plaintiff intimates that a higher price might be procured if the property were sold at public auction is mere speculation.

Plaintiff criticizes the sale recommended to the certificate holders by the stock trustees but offers no assurance that if this sale were abandoned, a resale would produce a better price. In the case of judicial sales, it has been repeatedly held that one who attacks such a sale on the ground of inadequacy of price and demands a resale should furnish a guaranty that the resale will produce a higher price, such guaranty to be secured by bond or an adequate cash deposit. (Barnes v. Henshaw, 226 Ill. 605.) There is no reason in principle why this rule should not apply to the situation presented here where the holder of only ten shares of stock desires to upset a private sale of the corporate property, which is apparently satisfactory to the holders of the remaining 1077 shares. Plaintiff's complaint contains no allegation that is not entirely con-

her complaint on May 12, 1941 and notice of her motion for a temporary injunction to restrain the consummation of the sale. Plaintiff does allege in her complaint, by way of conclusion, that the price offered by Helmed for the property was inadequate and inadequate, but from the facts alleged therein the \$77,000 sale price for the property specified in the contract seems to be fairly adequate. The primary purpose of the complaint was to restrain the sale negotiated by the stock trustees so that the property might be sold at public auction, whereby, it was alleged a better price could or might be obtained as a result of competitive bids. The difficulty with plaintiff's position in this regard is that under the stock trust agreement the trustees were permitted in the exercise of their discretion to dispose of the property at private sale and there is no showing made that the trustees abused their discretion or that the contract of sale was tainted with fraud or dishonesty. Plaintiff insists that a higher price might be procured if the property were sold at public auction is mere speculation. Plaintiff criticizes the sale recommended to the certificate holders by the stock trustees but offers no assurance that if this sale were abandoned, a resale would produce better price. In the case of judicial sales, it has been repeatedly held that one who attacks such a sale on the ground of inadequacy of price and demands a resale should furnish a guaranty that the resale will produce a higher price, such guaranty to be secured by bond or an adequate cash deposit. (Barnes v. Barnhart, 226 Ill. 602.) There is no reason in principle why this rule should not apply to the situation presented here where the holder of only ten shares of stock desires to upset a private sale of the corporate property, which is apparently satisfactory to the holders of the remaining 1077 shares. Plaintiff's complaint contains no allegation that is not entirely cor-

sistent with the fact that the sale of the property to Melmed at \$57,000 with brokerage commission of \$2,710 payable to Morris B. DeWoskin & Co., was satisfactory to all the certificate holders except her. There can be no question but that the stock trustees and the assenting certificate holders, so long as they acted honestly and in good faith, and there was nothing in the complaint to show that they did not so act, were at liberty to choose the method of sale which in their judgment would produce the best result. "So long as the trustee is exercising the discretionary powers conferred upon him honestly and reasonably, a court of equity has no right to interfere." Martin v. McCune, 318 Ill. 585. In view of the fact that plaintiff offered no assurance that, if the sale to Melmed were not consummated the property could be sold at a better price, a court of equity would not be justified in subjecting the holders of certificates for 1077 shares of the corporate stock to the speculative risk of a resale of the property at public auction at the demand, or should we say at the mere whim, of a holder of ten shares of said stock. As to the provision in the contract of sale giving Melmed, the purchaser, the right or option to match any higher offer made for the property, we think that under all the circumstances said provision was entirely fair and equitable.

When twenty days passed after the submission by the stock trustees to the certificate holders of the terms of the sale, without dissents by the holders of certificates for one-third or more of the shares and without a higher offer for the property, the trustees became legally and equitably bound to cause the corporation to consummate the sale and the purchaser became legally and equitably entitled to receive a deed upon payment of the balance of the purchase price. It does not appear from the complaint how the sale to Melmed, who was not a party to this proceeding, could be voided without violating his legal and equitable rights. We are impelled

statement with the fact that the sale of the property to Melmed at \$27,000 with brokerage commission of \$2,710 payable to Morris B. DeWoskin & Co., was satisfactory to all the certificate holders except her. There can be no question but that the stock trustees and the assenting certificate holders, so long as they acted honestly and in good faith, and there was nothing in the complaint to show that they did not so act, were at liberty to choose the method of sale which in their judgment would produce the best result. "So long as the trustee is exercising the discretionary powers conferred upon him honestly and reasonably, a court of equity has no right to interfere." Martin v. McGuire, 318 Ill. 585. In view of the fact that plaintiff offered no assurance that, if the sale to Melmed were not consummated the property could be sold at a better price, a court of equity would not be justified in subjecting the holders of certificates for 1077 shares of the corporate stock to the speculative risk of a resale of the property at public auction at the demand, or should we say at the mere whim, of a holder of ten shares of said stock. As to the provision in the contract of sale giving Melmed, the purchaser, the right or option to retain any higher offer made for the property, we think that under all the circumstances said provision was entirely fair and equitable. When twenty days passed after the submission by the stock trustees to the certificate holders of the terms of the sale, without dissent by the holders of certificates for one-third or more of the shares and without a higher offer for the property, the trustees became legally and equitably bound to cause the corporation to consummate the sale and the purchaser became legally and equitably entitled to receive a deed upon payment of the balance of the purchase price. It does not appear from the complaint how the sale to Melmed, who was not a party to this proceeding, could be voided without violating his legal and equitable rights. We are impelled

to hold that the complaint shows on its face that the sale of the corporate property by the defendant trustees to Melmed was made in conformity with the method prescribed by the stock trust agreement.

As to plaintiff's contention that the trial court erred in denying her leave to file an amended complaint after it had dismissed her original complaint for want of equity, it is sufficient to state that she at no time preferred an amendment or amendments or an amended complaint or indicated how her complaint could be amended to state a good cause of action, either for injunction or accounting. The insufficiency of her complaint was not merely formal. It was fundamental and irremediable. No change in the form of the allegations of her complaint could obviate the complete lack of equity in her demand that the Melmed contract be repudiated, regardless of the consequences to the corporation and its shareholders, simply because plaintiff desired to experiment with another method of sale. It is readily apparent that plaintiff's complaint could not be made good by amendment. Liberality of amendment did not require the trial court to aid in prolonging a suit of this nature.

We think the language used by the court in Danmeyer v. Coleman, 11 Fed. 97, is peculiarly applicable to the complaint filed herein. There the court stated at p. 101:

"It is always a suspicious circumstance where a single stockholder, among a large number in a corporation, rushes into a court of equity to vindicate, unaided and alone, the rights of the corporation and all other stockholders; and especially is this so where the amount of stock owned by him is so very limited that in case of success his own share of the recovery will be so small as to make the maxim, de minimis no curat lex, very properly applicable \*\*\*."

For the reasons stated herein the orders of the Circuit court are affirmed.

ORDERS AFFIRMED.

Scanlon, P. J., and Friend, J., concur.

As to plaintiff's contention that the trial court erred in its conclusion that the defendant was not negligent, the court found that the defendant was negligent in that it failed to maintain its premises in a safe condition, and that the defendant was negligent in that it failed to maintain its premises in a safe condition, and that the defendant was negligent in that it failed to maintain its premises in a safe condition.

denying her leave to file an amended complaint after it had been filed. Her original complaint for want of due diligence, it is not intended to state that she at no time procured an amendment or amendment or an amended complaint or indicated how her complaint could be amended to state a good cause of action, either for injunction or accounting. The investigation of her

ment and irreparable. No remedy in the form of the injunction of her complaint could obviate the complete loss of equity in the demand that the related contract be published, regardless of the consequences to the corporation and its shareholders, simply because as plaintiff desired to experiment with another method of sale, it is readily apparent that plaintiff's complaint could not be cured by amendment. Liberality of amendment did not require the bill count to aid in prolonging a suit of this nature.

There the court stated at p. 101:  
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"It is always a complicated situation, where a single stockholder, among a large number, in a corporation, wishes to vindicate of equity to vindicate, unaided and alone, the rights of the corporation and all other stockholders; and especially in this case, the amount of stock owned by him is so very limited that in order to success his own share of the recovery will be so small as to make the maxim, de minimis no curat, very properly applicable."

For the reasons stated herein the orders of the Board are

DOROTHY SCHREIBER, GEORGE  
LOVEWELL and ALVERA LOVEWELL,  
Appellees,

vs.

CATHERINE LOVEWELL, also known  
as KATIE KELLY and KATIE IRWIN,  
et al.,  
Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

314 I.A. 201'

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal by defendant seeks to reverse certain portions of the decree entered herein.

Plaintiffs, Dorothy Schreiber, George Lovewell and Alvera Lovewell, filed a complaint on October 31, 1940, in which they alleged that their father, Alva J. Lovewell, after having been previously divorced from his first wife, who was their mother, entered into a marriage ceremony with the defendant, Catherine Lovewell, on September 4, 1936; that prior to said marriage the defendant had been divorced from her former husband, John Kelly; that her divorce from Kelly was "null and void;" that her purported marriage to their father was invalid because he was insane when the marriage ceremony was performed and, therefore, incompetent to enter into a valid marriage; and that their father, Alva J. Lovewell, was adjudged insane October 30, 1940 and committed to the Elgin State Hospital for the Insane, where he died October 20, 1940.

The complaint sought to have defendant's divorce from her former husband and her marriage to plaintiffs' father declared invalid and set aside and asked for an accounting from her concerning all her dealings with their father since the date of her marriage to him. The complaint concluded with the prayer that defendant be compelled to account for the proceeds of

DOROTHY SCHNEIDER, GEORGE  
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COOK COUNTY.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal by defendant seeks to reverse certain

portions of the decree entered herein.

Plaintiffs, Dorothy Schneider, George Lovewell

and Alvira Lovewell, filed a complaint on October 23, 1940, in

which they alleged that their father, Alva J. Lovewell, after hav-

ing been previously divorced from his first wife, who was their

mother, entered into a marriage ceremony with the defendant, Cath-

erine Lovewell, on September 4, 1938; that prior to said marriage

the defendant had been divorced from her former husband, John

Kelly; that her divorce from Kelly was "null and void"; that her

purported marriage to their father was invalid because he was in-

competent to enter into a valid marriage; and that their father, in-

competent to enter into a valid marriage; and that their father,

Alva J. Lovewell, was adjudged insane October 23, 1940 and com-

mitted to the Elgin State Hospital for the Insane, where he died

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The complaint sought to have defendant's

divorce from her former husband and her marriage to plaintiffs

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date of her marriage to him. The complaint concluded with the

prayer that defendant be compelled to account for the proceeds of



certain insurance policies and the proceeds of the sale of certain property in Evanston, Illinois, which was held in joint tenancy in the name of defendant and Alva J. Lovewell. It also asked that deeds, which created a joint tenancy in defendant and Alva J. Lovewell in certain vacant lots in Chicago theretofore owned by Alva J. Lovewell, be declared invalid because of his incompetency to create said joint tenancy. Defendant's answer denied all of the material allegations of the complaint.

Inasmuch as the decree declared that defendant's divorce from her former husband and her marriage to Alva J. Lovewell were valid and that she was entitled to receive the proceeds of the insurance policies in question and no appeal was taken from the portions of the decree involving such matters, those issues having been finally determined, are eliminated. The portions of the decree from which this appeal is taken are as follows:

"The court further finds that the said Alva J. Lovewell was on May 8, 1940 the owner of certain real estate, described in the bill of complaint, and herein described as follows: [Here follows description of lots in Chicago, Illinois.] "that said lots are vacant and unimproved; that on said date, to-wit: May 5, 1940, the said Alva J. Lovewell signed, executed and delivered deeds to create a joint tenancy title in and to the said three vacant lots, in the name of himself and his wife, Catherine Lovewell; that at the time of the signing of the said deeds and creating the said joint tenancy title, the said Alva J. Lovewell was incompetent, insane and his act and actions hereby adjudged void, illegal, unlawful and not binding upon him by reason of his want of mental capacity.

\* \* \* \*

"It is Further Ordered, Adjudged and Decreed that the money deposited with the First National Bank of Chicago and standing in the name of Catherine Lovewell, being Savings Account

certain insurance policies and the proceeds therefrom, certain property in Evanston, Illinois, which was held in joint tenancy in the name of defendant and Alva J. Novawell. It also asked that deeds, which created a joint tenancy in defendant and Alva J. Novawell in certain vacant lots in Chicago, be set aside and the lots be sold and the proceeds thereof be divided equally between the two parties. Defendant also asked that the court appoint a receiver to take possession of the property and to sell the same and to divide the proceeds thereof between the two parties. Defendant also asked that the court appoint a receiver to take possession of the property and to sell the same and to divide the proceeds thereof between the two parties.

Plaintiff as the decedent died testate, leaving a will which provided that the property should be divided equally between the two parties. Plaintiff also claimed that the property should be divided equally between the two parties. Plaintiff also claimed that the property should be divided equally between the two parties. Plaintiff also claimed that the property should be divided equally between the two parties.

"The court further finds that the said Alva J. Novawell was on May 8, 1940 the owner of certain real estate, to-wit: [in the bill of complaint, the court described as follows: 'That said lots are vacant and unimproved, and on said date, to-wit: May 8, 1940, the said Alva J. Novawell signed, executed and delivered deeds to create a joint tenancy title in and to the said three vacant lots in the name of himself and his wife, Catherine Novawell; that at the time of the making of the said deeds and executing the said joint tenancy title, the said Alva J. Novawell was sane, of sound mind and his act and actions hereby alleged, illegal, unlawful and not binding upon him by reason of his want of mental capacity.

\*\*\*

"It is further ordered, that the said Alva J. Novawell be appointed receiver of the property and to sell the same and to divide the proceeds thereof between the two parties. Plaintiff also claimed that the property should be divided equally between the two parties. Plaintiff also claimed that the property should be divided equally between the two parties. Plaintiff also claimed that the property should be divided equally between the two parties.

No. 1309236, and admitted by the answer of the said defendant, to be of a present balance of Three Thousand Five Hundred Forty Dollars \* \* \* be and the same is hereby declared to be the property of the said Catherine Lovewell and the heirs at law of Alva J. Lovewell, deceased; that the said Catherine Lovewell has a one-half interest in said fund and the remainder shall be divided share and share alike among the heirs at law of Alva J. Lovewell, deceased; the said First National Bank is directed to make payment as herein provided, upon presentation of a certified copy of this decree."

The cause was referred to a master in chancery and the pertinent portions of his report are as follows:

"ISSUES.

"The capacity of Alva J. Lovewell to understand the transfer of the vacant lots on May 8, 1840, in the name of himself and Catherine Lovewell, as joint tenants, and the validity of said transfer.

"The capacity of Alva J. Lovewell to understand the transfer of the Evanston property on September 4, 1887, in the name of himself and Catherine Lovewell, as joint tenants, and the validity of said transfer.

"The capacity of Alva J. Lovewell to understand the transfer of the home in Evanston from himself and wife to strangers to this transaction from which there was received approximately \$4,500.00, and to whom the proceeds of said sale belonged, most of which is in possession of certain defendants, subject to the order of this court.

"EVIDENCE.

"The plaintiffs are the children of Alva J. Lovewell by a former marriage, and are all of legal age.

"Alva J. Lovewell did own the vacant property at the time of his marriage to said Catherine Lovewell and at the time of

[illegible]

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Transfer of the volume to the Library of Congress  
and Catholic University, Washington, D.C.  
Transfer.

[illegible]

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a legitimate organization or a subversive one.

[illegible]

his death was held in joint tenancy with said Catherine Lovewell, the transfer having been made on May 8, 1940.

"The home in Evanston, Illinois, was sold prior to the death of Alva J. Lovewell, after the same had been placed in joint tenancy with said Catherine Lovewell, and there was received certain funds, \$3,540.00 of which is in a savings account in the First National Bank of Chicago in the name of Catherine Lovewell.

\* \* \*

"Alva J. Lovewell was declared insane by the County Court of Cook County, Illinois, on October 3, 1940, and committed to the Elgin State Hospital for the Insane, where he died on October 20, 1940, and medical proof was produced showing that said mental illness of said Alva J. Lovewell was not of a sudden nature on October 3, 1940, but was a condition which had been in existence for several years, and that said Alva J. Lovewell had worked regularly for the Chicago Surface Lines as a motorman up to August 2, 1939, when his work was discontinued because of an accident had by said Alva J. Lovewell through his fault, for no apparent reason, indicating a mental illness at that time.

"There is no definite date as to the beginning of his mental illness or as to the extent thereof from time to time, from the date of his divorce in 1936, except for his action and the definite proof of insanity on October 3, 1940, except that he was examined by a psychiatrist on November 27, 1939, who pronounced him definitely insane.

"FINDINGS.

"From all the competent evidence, I find that said Alva J. Lovewell was insane on August 2, 1939, and continuously thereafter, to such an extent and degree that any attempted actions or acts of his would not be legal, lawful and binding upon him by reason of his mental condition, but prior to said date I

the first national board of directors in the history of the United States. The board was organized in 1914, and its members were elected by the stockholders. The board's first act was to appoint a committee to study the company's financial affairs. This committee reported in 1915, and its findings led to the formation of the first national board of directors in the history of the United States.

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am constrained to make any such findings as to any actions or acts of the said Alva J. Lovewell testified to and complained of herein.

\* \* \*

"In conclusion, I recommend that all transactions complained of by said plaintiffs, made by said Alva J. Lovewell after August 2, 1939, wherein said defendant Catherine Lovewell benefited thereby, be set aside and held for naught; that said Catherine Lovewell account for any such benefits derived from any such transactions, and that the proceeds of such accounting be subject to the orders of this Court, consistent with the status of said funds, as though they were in the hands of said Alva J. Lovewell as of said date."

Since no exceptions were made to the evidence and findings reported by the master and since the master's report was "in all respects confirmed and approved by the court," the facts found in said report are not open to dispute. The court decreed in accordance with the master's recommendation that "the said Alva J. Lovewell became mentally incapacitated on August 2, 1939, and continuously thereafter to such an extent and degree that any attempted actions or acts of his would not be legal, lawful and binding upon him by reason of his mental condition, and that his insanity commenced with said date, to wit: August 2, 1939, but that his actions or acts prior to that date were in every way legal and done by him in possession of sufficient mental capacity."

Defendant is bound by the foregoing findings of the master as confirmed by the court's decree and her contention that the trial court "should have sustained the deed executed by Alva J. Lovewell on May 4, 1940, creating a joint tenancy between himself and Catherine Lovewell, his wife, in Lots 1, 2 and 3 in Block 1 in Fullerton Avenue Manor, vacant and unimproved" is without merit. Since Lovewell was found to be insane on August 2, 1939 and continuously thereafter until the time of his death, and absolutely lacking in mental capacity, it necessarily follows that his deed

was constrained to make any such findings as to any action or inaction of the said Alvin J. Loveless testified to and admitted of receipt.

" \* \* "

"In conclusion, I recommend that all the actions

comprised of by said Alvin J. Loveless, made by said Alvin J. Loveless after August 2, 1933, wherein said defendant Catherine Loveless benefited thereby, be set aside and held for nullity; that said Catherine Loveless well account for any such benefits deriving from any action or inaction, and that the proceeds of such accounting be subject to the order of this Court, consistent with the status of said funds, as herein they were in the hands of said Alvin J. Loveless as of said date."

Since no exceptions were made to the findings and conclusions reported by the master and since the master's report was "in all respects confirmed and approved by the court," the facts found in said report are not open to dispute. The court agreed in accordance with the master's recommendation that "the said Alvin J. Loveless became mentally incompetent on August 2, 1933, and continuously thereafter to such an extent and degree that any attempted actions or acts of his would not be legal, lawful and binding upon him by reason of his mental condition, and that his insanity commenced with said date, to wit: August 2, 1933, and that his actions or acts prior to that date were in every way legal and done by him in possession of sufficient mental capacity."

Defendant is bound by the foregoing findings and conclusions as confirmed by the court's decree and her contention that the trial court "should have sustained the deed executed by Alvin J. Loveless on May 4, 1940, creating a joint tenancy between himself and Catherine Loveless, his wife, in Lots 1, 2 and 3 in Block 1 in Pullerton Avenue Manor, vacant and unimproved" is without merit. Since Loveless was found to be insane on August 2, 1933 and continuously thereafter until the time of his death, and absolutely lacking in mental capacity, it necessarily follows that his deed



of his vacant lots to a third party and the deed of said lots back to himself and his wife in joint tenancy on May 14, 1940, were invalid. In support of her instant contention defendant cites a line of cases to the effect that a mere impairment of memory by reason of advanced years does not of itself indicate a want of power to comprehend a particular transaction and to dispose of property in such a transaction. (English v. Porter 109 Ill. 285; Kelly v. Nusbau, 244 Id. 158; Riordan v. Murray, 249 Id. 517; Ludewick v. Ludewick, 279 Id. 27; Bordner v. Kelso, 293 Id. 175; Harrington v. Travis, 349 Id. 606.) None of these cases deals with a person who is definitely insane and utterly lacking in mental capacity and they are readily distinguishable from the case at bar. They are concerned with individuals who "may be to some extent impaired by age or disease," or "who may be impaired by disease incidental to old age." or where there is "mere impairment of memory by reason of advanced years" or with a person who is "to some extent impaired by age" or where there exists "old age eccentricity or even partial impairment of mental faculties." In our opinion the chancellor properly found that there was no joint tenancy created in the vacant lots in question and that the sole title in and to such lots was vested in Alva J. Lovewell at the time of his death.

As heretofore shown, Alva J. Lovewell and the defendant were married September 4, 1936. At the time of said marriage Lovewell owned a vacant lot on Brummel street in Evanston, Illinois. In 1937 he built a home on this property and created a joint tenancy as to these premises in himself and defendant on September 4, 1937. Lovewell and his wife entered into a contract for the sale of the Evanston property on May 10, 1940 and at that time they executed a warranty deed transferring said property to the purchaser. On September 1, 1940, when the sale was consummated, they received for their equity \$3,540, which was deposited in a savings account in the First National Bank of Chicago in

of his vacant lots to a third party and the deed was void back to himself and his wife in joint tenancy on May 1, 1937, were invalid. In support of her instant contention defendant offers a line of cases to the effect that a mere impairment of memory by reason of advanced years does not of itself indicate a want of power to comprehend a particular transaction and to dispose of property in such a transaction. (Wright v. Porter, 109 Ill. 288; Kelly v. Whelan, 444 Ill. 188; Richardson v. Murray, 249 Ill. 517; Indelic v. Ludwick, 274 Ill. 237; Johnson v. Koles, 293 Ill. 175; Hamington v. Lewis, 311 Ill. 306.) None of these cases deals with a person who is definitely insane and utterly lacking in mental capacity and they are readily distinguishable from the case at bar. They are concerned with individuals who "may be to some extent impaired by age or disease," or "who may be impaired by disease incidental to old age," or "where there is mere impairment of memory by reason of advanced years" or with a person who is "to some extent impaired by age" or where there exists "old age eccentricity or even partial impairment of mental faculties." In our opinion the chancellor properly found that there was no joint tenancy created in the vacant lots in question and that the sole title in and to such lots was vested in Alva J. Lovewell at the time of his death.

As heretofore shown, Alva J. Lovewell and his defendant were married September 4, 1936. At the time of said marriage Lovewell owned a vacant lot on Brunel street in Evanston, Illinois. In 1937 he built a home on this property and created a joint tenancy as to these premises in himself and defendant on September 4, 1937. Lovewell and his wife entered into a contract for the sale of the Evanston property on May 10, 1940 and at that time they executed a warranty deed transferring the property to the purchaser. On September 1, 1940, when the sale was consummated, they received for their equity \$2,540, which was deposited in a savings account in the First National Bank of Chicago in

defendant's name. As already shown, the chancellor decreed that this fund of \$3,540 "be and the same is hereby declared to be the property of the said Catherine Lovewell and the heirs at law of Alva J. Lovewell, deceased; that the said Catherine Lovewell has a one-half interest in said fund and the remainder shall be divided share and share alike among the heirs at law of Alva J. Lovewell, deceased; the said First National Bank is directed to make payment as herein provided, upon presentation of a certified copy of this decree."

Defendant contends that "the Court should have decreed that the proceeds received from the sale of the improved real estate at 1525 Brummel Street, Evanston, amounting to \$3540.00 which were deposited intact in the First National Bank of Chicago, in the name of Catherine Lovewell, with the knowledge and consent of Alva Lovewell, belonged to Catherine Lovewell absolutely," because (1) "a joint tenancy title existed as to said funds on deposit between Alva J. Lovewell and Catherine Lovewell, being the proceeds of the sale of real estate owned as joint tenants," and because (2) "A gift from the husband to the wife of said funds is presumed."

There is no merit in defendant's contention that a joint tenancy with the right of survivorship existed between her and Alva J. Lovewell as to the funds on deposit in the bank, which represents the proceeds of the sale of the property. It does not clearly appear how defendant came into possession of the proceeds of the sale, but in any event she did not even pretend to preserve any joint ownership in or title to such funds but deposited same in her own name and account.

Section 2, Chap. 76, Ill. Rev. Stat. 1939, provides in part as follows:

"Except as to executors and trustees, and except also where by will or other instrument in writing expressing an intention to create a joint tenancy in personal property with the right of survivorship, the right or incident of survivorship as between

defendant's name. As a body and, the on the 1st of January 1911, this fund of \$5,000 and the same is hereby declared to be the property of the said Catherine Lovewell and the heirs at law of Alva J. Lovewell, deceased; that the said Catherine Lovewell has a one-half interest in said fund and the remainder shall be divided share and share alike among the heirs at law of Alva J. Lovewell, deceased; the said First National Bank is directed to make payment as herein provided, upon presentation of a certified copy of this decree.

Defendant contends that "the court should have decreed that the proceeds received from the sale of the approved real estate at 1525 Broadway Street, Boston, amounting to \$54,000 which were deposited intact in the First National Bank of Chicago, in the name of Catherine Lovewell, with the knowledge and consent of Alva Lovewell, belonged to Catherine Lovewell absolutely," because (1) "a joint tenancy title existed as to said funds on deposit between Alva J. Lovewell and Catherine Lovewell, being the proceeds of the sale of real estate owned as joint tenants," and because (2) "a gift from the husband to the wife of said funds is presumed." There is no merit in defendant's contention that a joint tenancy with the right of survivorship existed between her and Alva J. Lovewell as to the funds on deposit in the bank, which represents the proceeds of the sale of the property. It does not clearly appear how defendant came into possession of the proceeds of the sale, but in any event she did not even pretend to preserve any joint ownership in or title to such funds but deposited same in her own name and account.

Section 1, Chap. 78, Ill. Rev. Stat. 1907,

provided in part as follows:

"Except as to executors and trustees, and except also where by will or other instrument in writing expressing an intention to create a joint tenancy in personal property with the right of survivorship, the right or incident of survivorship as between

joint tenants or owners of personal property is hereby abolished, and all such joint tenancies or ownerships shall, to all intents and purposes, be deemed tenancies in common \* \* \*."

Here no instrument in writing was executed as to the funds on deposit in the First National Bank "expressing an intention to create a joint tenancy in personal property with the right of survivorship." We are impelled to conclude that there was no joint tenancy between Alva J. Lovewell and the defendant, his wife, in the funds in question.

As to defendant's contention that "a gift from the husband to the wife of said funds is presumed," it is sufficient to state that Alva J. Lovewell did not on September 1, 1940, when the money was received by defendant from the sale of the property, have the legal capacity to make a gift inasmuch as he had been insane continuously since August 2, 1939.

Both plaintiffs and defendant contend that the chancellor erred as to the manner in which he directed that the funds in the First National Bank should be distributed. The decree is ambiguous and it must be construed for the purpose of clarifying its provisions pertaining to said funds in said bank.

It will be noted that the decree directed that half of the \$3,540 on deposit in the First National Bank of Chicago be paid to defendant and that the other half be "divided share and share alike among the heirs at law of Alva J. Lovewell, deceased." Plaintiffs were ~~the~~ heirs at law of Lovewell and so was defendant one of his heirs at law. We think that the language used in the decree, fairly and reasonably construed, was intended to mean that half of the funds in question belonged to Alva J. Lovewell prior to his death and that the other half belonged to defendant. Since Lovewell died intestate his share of the funds must necessarily be distributed according to the provisions of the Descent Act (Chap. 39 Ill. Rev. Stat. 1939.) While the decree states that "the remainder [Alva J. Lovewell's half of the proceeds of the sale] should be divided share and share alike among the heirs at law of Alva J. Lovewell,"

joint tenants or tenants in common. In every case, and all such joint tenants or tenants in common, and purposes, be deemed tenants in common.

Here no instrument in writing was executed as to

the funds on deposit in the First National Bank "expressed in the

intention to create a joint tenancy in personal property with the

right of survivorship." The law is to be applied that there was

no joint tenancy between Mrs. Lovewell and the defendant, his

wife, in the funds in question.

As to defendant's contention that he did not

husband to the wife of said funds is presumed," it is sufficient to

state that Mrs. Lovewell did not on October 1, 1933, when the

money was received by defendant from the sale of the property, have

the legal capacity to make a gift inasmuch as she had then become com-

minously insane since August 1, 1933.

Both plaintiff and defendant contend that the

cellor acted as to the manner in which the funds were to be

the First National Bank should be distributed. The decree is an-

plignous and it must be construed for the purpose of distributing the

provisions pertaining to said funds in said bank.

It will be noted that the decree directed that half of

the \$3,540 on deposit in the First National Bank of Chicago be paid to

defendant and that the other half be "divided among and share alike

among the heirs at law of Mrs. Lovewell deceased." Plaintiff

here xxx heirs at law of Lovewell and he is defendant of one of his

heirs at law. We think that the language used in the decree, fairly

and reasonably construed, was intended to mean that half of the

funds in question belonged to Mrs. Lovewell prior to her death

and that the other half belonged to defendant. Since Lovewell

intestate his share of the funds must necessarily be divided

according to the provisions of the Decree of the Court of Illinois

Stat. 1933. While the decree states that "the same shall be

Lovewell's half of the proceeds of the sale) should be divided

share and share alike among the heirs at law of Mrs. Lovewell,"

the chancellor could not under the law, even if he had been so inclined, preclude defendant from participating as the surviving widow of Alva J. Lovewell in the distribution of his personal property. The distribution could not be made to the "heirs at law" share and share alike because subsection 4 of section 1 of the foregoing statute provides:

"When there is a widow or a surviving husband and also a child or children or descendants of such child or children of the intestate, the widow or surviving husband shall receive as his or her absolute personal estate, one-third of all the personal estate of the intestate \* \* \*."

Therefore defendant is entitled to receive half of the fund of \$3,540 or \$1,770 and in addition thereto one third of Alva J. Lovewell's half of said fund or \$590, amounting in all to \$2,360. The balance of the fund in the First National Bank of Chicago, amounting to \$1,180, should be distributed share and share alike to plaintiffs.

For the reasons stated herein the decree of the Superior court is affirmed in part and reversed in part and the cause is remanded with directions to enter a decree in conformity with the views herein expressed.

AFFIRMED IN PART  
REVERSED IN PART and  
REMANDED WITH DIRECTIONS.

Scanlan, P. J. and Friend, J., concur.

[illegible][illegible]

There is no doubt that the above information is correct.

of the fund of \$54,000, 1,750 in addition thereto are being

Alvin J. Loveless' half of said tract or lots

1880. The balance of the fund in the first quarter of 1880.

Chicago, amounting to \$1,181, should be distributed as follows:

... of the ...

For the reasons set forth above, the Commission finds that the proposed rule is not unduly burdensome on the parties and is in the public interest.

UNITED STATES DEPARTMENT OF JUSTICE

and this information is entered in column 2 of schedule 111. Because a

views herein expressed.

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Account, B. J. and Wife, 1. 1. 1900.



IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A.D. 1942.

MIDWEST INVESTMENT AND  
FINANCE COMPANY, a  
Corporation,

APPELLANT,

vs.

CLARA L. GATTON,

APPELLEE.

APPEAL FROM THE CIRCUIT  
COURT OF PEORIA COUNTY.

314 I.A. 201<sup>2</sup>

HUFFMAN, P. J.

Appellee was engaged in the secondhand car business in the city of Peoria. Appellant financed the conduct of this business. On May 12, 1938, it took judgment by confession against appellee in the sum of \$6372.71, consisting of \$5098.17, principal, and a 25% attorney fee amounting to \$1274.54. The judgment was based upon twenty-one separate instruments, consisting of two types. Six of the instruments are what is commonly called trust receipts. These arise out of a form of financing usually referred to as the floor plan. Under this plan, the dealer is financed for the cars he has on hand for retail sales. Fifteen of the instruments declared upon were promissory notes, bearing appellee's endorsement, arising from sales of cars by her to various purchasers.

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THE TROUBLE WITH THE GUN  
IS, YET, THE GUN  
... (mirrored text)

## RESULTS

2357

CELEBRATING 100 YEARS

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Upon motion of appellee, the judgment was opened up and leave given to plead. She alleges that it was the custom of appellant, in financing the sale of automobiles to purchasers, to withhold from her a certain amount upon each sale, termed a reserve account, and which reserve fund was to be paid to her within six months from the date of the transaction, with interest. She alleges that appellant had never paid any of the reserve funds upon such transactions, charging that the total of such sums so held in reserve by appellant, and then due her, amounted to \$4030.67. A bill of particulars was filed by her itemizing such accounts. Appellant admitted liability on these reserve accounts in the amount of \$3654.78.

Appellee filed counterclaim in which she set up that in 1936, she obtained a divorce from her husband in the Circuit Court of Peoria county, and that by the decree, she was awarded the sum of \$7000, as alimony; that prior to such time, her husband had many business transactions with appellant similar to those between appellee and appellant; that appellant was then holding more than \$7000, in a reserve account due to her husband; and that the divorce decree restrained appellant from paying to her husband any of such money. She alleges that subsequent to the decree and restraining order, and at the instance of appellant and her husband, she consented for the writ to be dissolved in consideration that her husband would assign to her \$2500, of his reserve account with appellant, and that appellant would pay to her this sum of money to apply upon her alimony.

Upon motion of appellee, the judgment was opened up  
 and leave given to plead. She alleged that it was the  
 custom of appellant, in financing the sale of automobiles  
 to purchasers, to withhold from her a certain amount upon  
 each sale, termed a reserve account, and which reserve  
 fund was to be paid to her within six months from the  
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 a reserve account due to her husband; and that the divorce  
 decree restrained appellant from paying to her husband any  
 of such money. She alleges that antecedent to the decree  
 and restraining order, and at the instance of appellant  
 and her husband, she consented for the writ to be dissolved  
 in consideration that her husband would assign to her \$2500  
 of his reserve account with appellant, and that appellant  
 would pay to her this sum of money to apply upon her alimony.

She further alleges that her husband and appellant so agreed, whereupon on motion of her husband, with her consent, the writ was dissolved. She charges that pursuant to the above agreement, appellant became liable to pay to her the sum of \$2500, which it had not done, although her husband did assign to her the agreed portion of his reserve account.

Appellant in its answer to the counterclaim, denies that it owed her former husband any money; denies that it promised to pay her \$2500, upon dissolution of the injunction; denies that it had anything to do with such dissolution; and alleges that it settled its accounts with her husband about four months after the injunction was dissolved.

The pleadings in the case are too extensive and involved to attempt to go into them. They take up each transaction, the details connected with the financing thereof, the charges, payments and credits thereon, and are so extended and involved that they cannot be set out within reasonable length. After the issues were finally settled, the case was tried by jury, which returned a verdict in favor of appellee for \$3300.00. The usual motions were filed by appellant, and denied. This appeal has followed from judgment on verdict.

Appellant makes twenty-three assignments of error. Appellee calls attention to the fact that assignments five to nineteen inclusive, are not included in the motion for a new trial. Examination of the record sustains this position of appellee, and those assignments will not be

The second witness, who was called to the stand, testified that he had seen the defendant on the night of the murder. He stated that he had seen the defendant in the company of a woman, who was also a witness in the case. The defendant was seen leaving the house of the woman at approximately 11:00 p.m. on the night of the murder. The witness stated that he had seen the defendant in the company of the woman on the night of the murder.

The third witness, who was called to the stand, testified that he had seen the defendant on the night of the murder. He stated that he had seen the defendant in the company of a woman, who was also a witness in the case. The defendant was seen leaving the house of the woman at approximately 11:00 p.m. on the night of the murder. The witness stated that he had seen the defendant in the company of the woman on the night of the murder.

The fourth witness, who was called to the stand, testified that he had seen the defendant on the night of the murder. He stated that he had seen the defendant in the company of a woman, who was also a witness in the case. The defendant was seen leaving the house of the woman at approximately 11:00 p.m. on the night of the murder. The witness stated that he had seen the defendant in the company of the woman on the night of the murder.

The fifth witness, who was called to the stand, testified that he had seen the defendant on the night of the murder. He stated that he had seen the defendant in the company of a woman, who was also a witness in the case. The defendant was seen leaving the house of the woman at approximately 11:00 p.m. on the night of the murder. The witness stated that he had seen the defendant in the company of the woman on the night of the murder.

considered. Appellee urges certain matters which might properly be considered only by way of cross error, and no cross errors are assigned. Where but one party appeals, the other is bound by the judgment, order or decree of the trial court, and cannot be heard on review, except in support of the decree or judgment from which the other party has appealed. As above stated, the issues were extended and very much involved. The abstract consists of over two hundred pages, which renders it difficult to attempt any review of the evidence.

Appellant made motion for the cause to be referred to a referee to take testimony, stating that it involved an accounting between the parties upon twenty-two written instruments based upon thirty-three separate transactions, while appellee was basing her claim upon one hundred thirty-six instruments, and that the questions in dispute were so complicated and involved that it would be impossible for a jury to hear the testimony and arrive at a correct solution. The motion was denied.

Appellee states that appellant would advance her money to go to various cities to purchase used automobiles, and take the same to Peoria for resale. It appears her husband was engaged in the same kind of business for many years, and that appellant had financed his business. She states that after the injunction issued in the divorce proceedings, restraining appellant from paying any money to her husband from his reserve account, that Mr. Smith, the manager of appellant company, came to her and advised her that her husband had about \$7500, due him in his reserve account;





that the writ had tied up the business transactions between him and appellant so that they could not carry on; and stated to her that if she would consent for the writ to be dissolved, he would have her husband assign to her \$2500, of his reserve account, and that appellant company would thereupon pay her this amount of money. She states she agreed to this and that Mr. Gatton filed his motion to dissolve the writ. The motion recites the decree for divorce; the award of alimony; his dealings with appellant; that he then had a reserve account due him from appellant of \$7500.93; and that pursuant to an agreement between himself and appellee, it was provided that such writ might be dissolved. The motion further set out that Mr. Gatton had been engaged in the secondhand automobile business for more than twenty-five years in the city of Peoria; that appellant had financed his operations; that his business with appellant was so interrupted and interfered with by the injunction writ that it had deprived him of his ability to operate his business by preventing his obtaining the necessary funds from appellant. It appears that Mr. Smith, manager of appellant company, was present with Mr. and Mrs. Gatton, and the witness Wilder, at Mr. Gatton's place of business, when he assigned to appellee the \$2500, of his reserve account with appellant, pursuant to the agreement. Shortly after this, it appears appellant took possession of the cars Mr. Gatton then had on hand, and following the judgment taken against appellee, took possession of such cars as she had on hand.

The trial apparently consumed about four days, and so many conversations, transactions and accounts were

The trial apparently commenced about 10:30 a.m., and  
cars as she had on hand.  
Judgment taken against appellee, but satisfaction of which  
of the same Mr. Patton had on hand, and following  
shortly after this, it appears appellant had possession  
respective account with appellee, however, it was understood  
business, when he refused to sign the check, and the  
Patton, and the witness stated, at the same time, that  
manager of appellee's company, or person with whom he was  
necessarily found from appellee. It appears that the  
to operate his business by retaining in operation, the  
injunction with which he had refused to sign the check.  
appellant was so interrupted and harassed with the  
and had financial affairs of his own to attend to  
than twenty-five years of his life of which that appellant  
been engaged in the automobile business, and in the  
dissolved. The witness further said that Mr. Patton  
self and appellee, it was provided that the wife should  
of \$7500.00; and that appellant was to receive a certain  
that he then had a reserve account due to him, and  
divorce; the court in ruling his decision was in favor  
dissolve the wife. The action was taken that day at 10:30  
the agreed to this and that Mr. Patton's action was  
would therefore receive this amount of \$7500.00. The action  
\$2500.00, of his reserve account, and the balance of the  
to be dissolved, he would have no further claim on the  
and stated to her that if she would sign the check, and  
toward him and appellee in that case would not carry out  
that the wife was to be paid in the amount of \$7500.00.

testified about that it is impossible to go into them in this opinion. Smith, manager of appellant company, insists that he never agreed with appellee to pay her the \$2500, due on Mr. Gatton's reserve account, stating as his reason, that Mr. Gatton was indebted to appellant for a larger sum than his reserve account totaled.

Appellee insists that the verdict is not only supported by the evidence but should have been for a larger sum. She claims that after allowing appellant all that it proved was due to it, she still had coming the sum of \$4273.11. These figures are arrived at from a review of the entire evidence together with all the extended accounts, some of which were in dispute. The record has been carefully reviewed. A majority of the questions involved in the trial were questions of fact for the jury. Appellant urges that the verdict is against the manifest weight of the evidence. This court does not feel that it can subscribe to this objection. Neither does the court find reversible error in the record. The judgment is therefore affirmed.

Judgment affirmed.

testified about that it is impossible to go into that in this opinion. Smith, manager of appellant company, testified that he never agreed with appellee to pay her the \$2500, due on Mr. Patton's reserve account, stating as his reason that Mr. Patton was indebted to appellee for a larger sum than his reserve account totaled.

Appellee insists that the verdict is not only supported by the evidence but she also have been for a larger sum. She claims that after allowing appellee all that it proved was due to it, she still had coming the sum of \$4783.11. These figures are arrived at from a review of the entire evidence together with all the extended accounts, none of which were in dispute. The record has been carefully reviewed. A majority of the questions involved in the trial were questions of fact for the jury. Appellant urges that the verdict is against the manifest weight of the evidence. This court does not feel that it can subscribe to this objection. Neither does the court find reversible error in the record. The judgment is therefore affirmed. Judgment affirmed.

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A.D. 1942.

314 I.A. 202

DONALD H. FRY,

APPELLEE,

vs.

EDGAR J. BUTTERFIELD

and GAIL SCOTT,

APPELLANTS.

APPEAL FROM THE COUNTY

COURT OF WINNEBAGO COUNTY.

HUFFMAN, P. J.

On February 27, 1941, Scott was driving a gravel truck for Butterfield. It had been snowing for some time and several inches of freshly fallen snow was upon the ground. Prior to the snow, it had been sleeting for about two hours. Appellee owned a filling station located about ten miles north of the city of Rockford. The gasoline pumps were located upon a cement platform. The platform is level and about one hundred feet long and forty feet wide. Gravel driveways lead from the highway to the platform. Scott drove one of Butterfield's gravel trucks from the highway into this filling station. The truck was loaded. Scott was familiar with this station as he had stopped there on previous occasions. As he drove his truck into the station and applied the brakes, the front wheels skidded and struck

1-6-68

1968 FEB 27

GEN. NO. 3752

IN THE DISTRICT COURT OF THE UNITED STATES

UNION PACIFIC RAILROAD

VERSUS

8111A.308

ROBERT H. FRY

ALBANY, N.Y.

vs.

ALBANY TOWNSHIP, N.Y.

COUNTY OF ALBANY, N.Y.

ROBERT J. GUTHRIE

and JOHN G. GUTHRIE

ALBANY, N.Y.

HUTCHMAN, P. 1.

On February 27, 1961, Scott was driving a gravel truck for Butterfield. It has been snowing for some time and several inches of freshly fallen snow was upon the ground. Prior to the snow, it had been sleeting for about two hours. Applebee owned a filling station located about one mile north of the city of Rochester. The gasoline pump were located upon a cement platform. The platform is level and about one hundred feet long and forty feet wide. Driveways lead from the highway to the platform. Both drove off of Butterfield's gravel truck to the highway into this filling station. The truck was loaded. Scott was familiar with this station as he had stopped there on previous occasions. As he drove his truck into the station and applied the brakes, the front wheels skidded and struck

a cooling machine used to cool soft drinks, which was at the side of the building. Evidence on behalf of appellee tended to prove damage of \$75.00 to the machine. The case originated in the Justice of the Peace court, and was on appeal from there to the county court. There were no pleadings. In the trial in the county court, the jury returned a verdict for appellee in the sum of \$65.00. Appellants have prosecuted this appeal from judgment rendered thereon.

The evidence is very brief and does not appear to be in dispute except with regard as to how far the cooling machine was displaced from its fixed position. Appellee claims the machine was pushed six feet, while Scott claims it was not pushed more than one foot. However, this has nothing to do with the damage to the machine. Scott testified as to the condition of the weather and the road. He states he thought there would be cinders underneath the snow, although he says that it had been sleeting for about two hours prior to the snow. He further says that he was familiar with this station, the approaches thereto, and the circumstances connected with driving under then existing conditions. The sum and substance of his testimony with respect to the accident is, that when he applied his brakes, the front wheels of the truck skidded and collided with the cooling machine. He states that he did not shift gears as he drove into the station, but denies that he was driving too fast.

It was a question of fact for the jury as to the negligence involved. The jury in the trial court had the opportunity of hearing the witnesses testify. It appears that other trucks and motor vehicles had been using the station that

a cooling machine used to cool soft drinks, which was at  
 the side of the building. Evidence on behalf of appellee  
 tended to prove damage of \$75.00 to the machine. The case  
 originated in the Justice of the Peace Court, and was on  
 appeal from there to the county court. There were no plead-  
 ings. In the trial in the county court, the jury returned  
 a verdict for appellee in the sum of \$60.00. Appellee  
 have prosecuted this appeal from judgment rendered thereon.  
 The evidence is very brief and does not appear to be  
 in dispute except with regard as to how far the cooling  
 machine was displaced from its fixed position. Appellee  
 claims the machine was pushed six feet, while appellant  
 it was not pushed more than one foot. However, this has  
 nothing to do with the damage to the machine. Next testi-  
 fied as to the condition of the weather and the road. He  
 states he thought there would be clouds underneath the snow,  
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 prior to the snow. He further says that he was familiar with  
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 gence involved. The jury in the trial court had the opportu-  
 nity of hearing the witnesses testify. It appears that other  
 trucks and motor vehicles had been using the station that



morning. We are of the opinion the issues were fairly presented to the jury and do not discover anything in the record which we think, misled or confused the jury. The judgment is therefore affirmed.

Judgment affirmed.

morning. We are of the opinion that the issues were fairly  
presented to the jury and we are convinced that the jury  
reached which we think, raised or considered the issue. The  
judgment is therefore affirmed.

Judgment affirmed.

*Sack*

GEN. NO. 9756

AGENDA NO. 15

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IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A.D. 1942.

314 I.A. 202<sup>2</sup>

W. L. SHERLOCK, EXECUTOR )  
OF THE ESTATE OF CORNELIUS )  
McGRATH, DECEASED, )

APPELLANT, )

vs. :

LOUISE McGRATH, )

APPELLEE. )

76 3  
1 94  
APPEAL FROM THE CIRCUIT

COURT OF CARROLL COUNTY.

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HUFFMAN, P. J.

This suit grows out of objections filed by appellee to the final report of appellant as executor of the estate of Cornelius McGrath. It appears that appellant qualified as such executor, and letters testamentary issued to him from the county court of Carroll county in June, 1938; that no inventory was ever filed; that upon qualifying as such executor, appellant transferred cash of said estate of approximately \$7,234.92, from various banks in Illinois, to the First National Bank of Monticello, Iowa, where it was placed to the credit of the Standard Credit Corporation; that this corporation was engaged in the loan business; that appellant owned forty-

IN THE APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

TERMINAL TERM, A.T. 1938

3141A.202

( W. L. SHINNICK, EXECUTOR  
OF THE ESTATE OF CORNELIUS  
MOGRATH, DECEASED,  
( APPELLANT,  
( vs.  
( LOUIS MOGRATH,  
( APPELLEE.

APPEAL FROM THE CIRCUIT  
COURT OF CARROLL COUNTY.

IN REPLY, P. 1.

This suit grows out of objections filed by appellee to the final report of appellant as executor of the estate of Cornelius Mograth. It appears that appellant qualified as such executor, and letters testamentary issued to him from the county court of Carroll county in June, 1936; that no inventory was ever filed; that upon daily liquidation of the estate, appellant transferred cash of said estate of approximately \$7,504.92, from various banks in Illinois, to the First National Bank of Chicago, Iowa, where it was placed to the credit of the Standard Credit Corporation; that this corporation was engaged in the loan business; that appellant owned forty-

five percent of the stock of said company; was president thereof, and directed and managed its affairs at a salary of \$5000, per year.

In December, 1940, by virtue of petition filed by appellee in the county court of Carroll county, said court issued its citation directing appellant to appear on December 19, 1940, and to bring into court the assets belonging to the estate, together with an inventory thereof, and an accounting of his transactions in connection therewith from the date of his appointment in June, 1938, to the date of such citation. In response thereto, appellant filed an account in the county court, which must have been in the nature of a final report. However, we are unable to state definitely in this regard as such account does not appear in the abstract or record. Objections were filed to this account by appellee, which are stated to have been sustained by the county court, and an appeal therefrom was taken by appellant to the circuit court of said county.

On a hearing in the circuit court from where this appeal is prosecuted, the court found that the acts of appellant in handling the assets of this estate, and his acts as executor, were wrongful and improper. The court found that he made misapplication of the same by placing them to the credit of his loan company, and not accounting for any interest thereon; that in such manner he used the money for his individual purpose; that such acts amounted to a conversion of the assets to the use of the company of which appellant was a member. The court found that no claims were ever filed against the estate of deceased, and that no indebtedness existed against

five percent of the stock of said company; was, for years thereafter, and directed and managed its affairs as a partner of \$5000, per year.

In December, 1940, by virtue of petition filed by appellee in the county court of Carroll county, said court issued its citation directed to appellant to appear on December 10, 1940, and to bring before the court the assets belonging to the estate, together with its inventory thereof, and an accounting of its transactions in connection therewith. From the date of its appointment in June, 1939, to the date of such citation. In response thereto, appellant filed an account in the county court, which was made up in the nature of a final report. However, we are unable to state definitely in this regard as such account does not appear in the abstract on record. Objections were filed to this account by appellee, which was held to have been sustained by the county court, and an appeal therefrom was taken by appellant to the circuit court of said county.

On a hearing in the circuit court from where the appeal is prosecuted, the court found that the acts of appellant in handling the assets of this estate, and his acts as executor, were wrongful and improper. The court found that he made misappropriation of the same by placing them in the credit of his loan company, and not accounting for any interest thereon; that in such manner he used the assets for his individual purpose; that such acts amounted to a conversion of the assets to the use of the company of which appellant was a member. The court found that no claims were ever filed against the estate of deceased, and that no indebtedness existed against

said estate except those incident to the last illness and funeral expenses. The court disallowed claim of the appellant for premium on surety bond as such executor following expiration of a year from the issuance of letters. The court reduced his executor's fees from \$805.32, to the sum of \$300.00; sustained objections to certain charges in connection with inheritance tax; charged appellant with interest on the assets used by his loan company at the rate of 2%, which amounted to the sum of \$330.56, and charged him with 10% interest on the assets handled by him after a period of two years from date of his appointment, which amounted to \$609.57. The items disallowed, together with interest, and the statutory penalty of 10% (Ch. 3, sec. 462, 1941 Ill. St.), totaled \$1653.90. Appellant has appealed from the above holding of the circuit court, and appellee has filed her cross-appeal, objecting to the allowance of the executor's fees in the sum of \$300.00, and to the rate of interest on the funds as fixed at 2%, urging such rate should have been 5%.

The only thing this court finds in the abstract is the trial court's findings of fact, conclusions of law, and judgment, together with his written remarks; testimony of appellant, who was called as an adverse witness under section 60 of the Practice act; testimony of an attorney with respect to what the customary fee in that county was for executors or administrators in similar estates; and testimony of appellee to the effect that she had importuned appellant at divers times to close the estate. Such facts as are set out from the finding of the trial court, are supported by the testimony of appellant. We find nothing in his testimony that speaks

of appellant. We find nothing in his testimony that speaks the finding of the trial court, are supported by the testimony times to close the estate. Such facts as are set out from to the effect that she had imprisoned appellant at diverse administrators in similar estates; and testimony of appellees what the customary fee in that county was for executors or the trustee act; testimony of an attorney with respect to ent, who was called as an adverse witness under section 80 of ment, together with his written remarks; testimony of appellee-trial court's findings of fact, conclusions of law, and judgment. The only thing this court finds in the abstract is the as fixed at 2%, urging such rate should have been 5%.

the sum of \$500.00, and to the rate of interest on the funds appeal, objecting to the allowance of the executor's fees in ing of the circuit court, and appellee has filed her cross- totaled \$1653.90. Appellant has appealed from the above hold- the statutory penalty of 10% (G.L. c. 48B, § 44A III. St.), \$609.57. The fees disallowed, together with interest, and two years from date of his appointment, which amounted to 10% interest on the assets handled by him after a period of which amounted to the sum of \$380.50, and charged him with on the assets used by his loan company at the rate of 2%, netion with inheritance tax; charged appellant with interest of \$300.00; sustained objections to certain charges in com- court reduced his executor's fees from \$800.32, to the sum expiration of a year from the issuance of letters. The and for premium on surety bond as such executor following funeral expenses. The court disallowed claim of the appel- said estate except those incident to the last illness and



in his behalf. The trial court had the parties before him and, no doubt, with much information not appearing in the limited record. This court is not disposed to disturb the judgment as rendered. The judgment is therefore affirmed.

Judgment affirmed.

Dove, J.

In my opinion appellant was not entitled to any fees for his services as executor and should have been charged with interest at the rate of 5% upon the money of the estate which he used in his loan company and as insisted by appellee upon her cross-appeal. In all other respects I concur in the foregoing opinion.

in his behalf. The trial court had the parties before him and, no doubt, with much information not appearing in the limited record. This court is not disposed to disturb the judgment as rendered. The judgment is therefore affirmed.

Judgment affirmed.

Dove, J.

In my opinion appellant was not entitled to any fees for his services as executor and should have been charged with interest at the rate of 5% upon the money of the estate which he used in his loan company and as insisted by appellee upon her cross-appeal. In all other respects I concur in the foregoing opinion.

314 I.A. 203'

GEN. NO. 9771

AGENDA NO. 24

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1942.

REBECCA CHRISTENSEN,

APPELLANT,

vs.

ELMER SCOGGIN, doing business

as TWIN CITY CAB COMPANY, ET AL.,

APPELLEES.

APPEAL FROM THE

CIRCUIT COURT OF

LAKE COUNTY.

HUFFMAN, P.J.

On the night of April 27, 1941, appellee, William Thommesson, Jr., was driving a car south on Hickory street in the city of Waukegan. Appellee, Frank H. Dickson, was riding with Thommesson. James Davis was driving a car west on Julian street. These two cars collided at the intersection of Hickory and Julian streets. The car being driven by Davis, after the impact, travelled a distance of approximately sixty-five feet when it went over the curb and struck the house of appellant, damaging same.

Appellant brought suit against the above named parties in Justice of the Peace Court, where she obtained judgment against them for \$250.00. Davis, the driver

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CHAS. E. HARRIS

CHAS. E. HARRIS

IN THE MATTER OF THE ESTATE OF

CHAS. E. HARRIS

DECEASED

REBECCA CHRISTENSEN,

ADMINISTRATOR.

vs.

ELMER SOGGIN, and others

as TRUSTEES OF THE ESTATE OF

CHAS. E. HARRIS

HARRIS, I. I.

On the night of April 10, 1912, at about 10 o'clock, a car driven by the defendant, Elmer Soggin, was traveling on the street in the city of Minneapolis, Minnesota, when it collided with the car of the plaintiff, Rebecca Christensen. The car being driven by the plaintiff, was traveling in the same direction as the car of the defendant, and the collision occurred at the intersection of the two streets. The car being driven by the plaintiff, was traveling at a speed of approximately 15 miles per hour, and the car of the defendant was traveling at a speed of approximately 20 miles per hour. The collision occurred at the intersection of the two streets, and the car of the plaintiff was thrown into the air and landed on the sidewalk. The car of the defendant was also thrown into the air and landed on the sidewalk. The collision caused the death of the plaintiff, Rebecca Christensen, and the injury of the defendant, Elmer Soggin.

Appellant brought suit against the defendant, Elmer Soggin, for damages on the basis of the fact that the defendant was negligent in the operation of his car, and that the collision was caused by the negligence of the defendant. The defendant denies the charge of negligence, and claims that the collision was caused by the negligence of the plaintiff, Rebecca Christensen.

of the car that struck appellant's residence, took no appeal from the above judgment. Thommesson and Dickson appealed therefrom to the Circuit Court of Lake county. Trial in that court, before a jury, resulted in a verdict of not guilty as to said defendant-appellees.

Appellant, plaintiff-below, made motion for a directed verdict against the defendants at the close of all the evidence. The court reserved ruling thereon until after verdict. Following verdict, the plaintiff-appellant filed motion for judgment notwithstanding the verdict. This motion and motion for directed verdict were denied by the court, and judgment rendered on the verdict for the defendant-appellees. Appellant has prosecuted this appeal from such judgment, urging as her ground for reversal, the refusal of the trial court to grant her motion for judgment notwithstanding the verdict and rendering judgment thereon.

Appellant testified that she heard a loud noise and upon investigating same, found the taxicab driven by Davis against the north wall of her house. Thommesson was called as an adverse witness. He states that he was proceeding south on Hickory street at a speed of approximately twenty to twenty-five miles per hour and with his headlights burning; that when he was in the center of the intersection of the two streets, the taxicab being driven by Davis, and travelling at a speed from forty to forty-five miles per hour, collided with his car, continued on up the street until it struck appellant's house. He says

of the car that struck appellant's residence, took no appeal from the above judgment. Thompson and Dickson appealed therefrom to the Circuit Court of Lake County. Trial in that court, before a jury, resulted in a verdict of not guilty as to said defendant-appellee.

Appellant, Plaintiff-below, made motion for a directed verdict against the defendant at the close of all the evidence. The court reserved ruling thereon until after verdict. Following verdict, the plaintiff-appellant filed motion for judgment notwithstanding the verdict. This motion and motion for directed verdict were denied by the court, and judgment rendered on the verdict for the defendant-appellee. Appellant has prosecuted this appeal from such judgment, urging as her ground for reversal, the refusal of the trial court to grant her motion for judgment notwithstanding the verdict and rendering judgment thereon.

Appellant testified that she heard a loud noise and upon investigating same, found the taxicab driven by Davis against the north wall of her house. Thompson proceeding south on Hickory street at a speed of approximately twenty to twenty-five miles per hour and with his headlights burning; that when he was in the center of the intersection of the two streets, the taxicab being driven by Davis, and traveling at a speed from forty to forty-five miles per hour, collided with his car, continued on up the street until it struck appellant's house. He says

that he did not see the taxicab until it was upon him. This constituted the evidence on behalf of appellant.

Thommesson testified in his own behalf, in substance the same as when called as an adverse witness under Section 60. He further states that immediately after the accident, he went up to the taxicab where the driver thereof stated in explanation of the collision that he did not have any brakes. The testimony of Dickson, and another passenger of the Thommesson car, tends to corroborate the testimony of Thommesson. The question of negligence of the parties in this case was a proper question for the jury and therefore the court did not err in denying appellant's motions. The judgment is affirmed.

Judgment affirmed.

that he did not see the accident until it was over him.  
 This constituted the evidence on behalf of the plaintiff.  
 Thompson testified in his own behalf, in substance  
 the same as when called as an adverse witness under the  
 rule 60. He further stated that immediately after the  
 accident, he went up to the tank where the driver  
 thereof stated an explanation of the collision and as  
 did not have any brakes. The testimony of the driver  
 another passenger of the Thompson car, tends to corroborate  
 the testimony of Thompson. The question of negligence  
 of the parties in this case was a proper question for the  
 jury and therefore the court did not err in denying appeal-  
 and's motions. The judgment is affirmed.

Judgment affirmed.



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

314 I.A. 203<sup>2</sup>

February Term, 1942

J. ERNEST BROOK, as Executor of  
the Estate of GEORGE S. WEDGE,  
deceased, and as Executor of the  
Estate of AMY M. WEDGE, deceased,

Appellant

-vs-

WILLIAM A. ROSING,

Appellee

APPEAL FROM

CIRCUIT COURT

OF KANE COUNTY.

DOVE, J.:

George S. Wedge died August 1, 1936. For upwards of fifteen years he and William A. Rosing, appellee, had been partners in the business of selling and distributing gasoline, oils and products connected therewith. The business was conducted as the Antioch Oil Company. After the death of George S. Wedge, appellant, as Executor of his estate, and Amy M. Wedge, surviving widow, instituted suit in the circuit court of Kane County against appellee as surviving partner, for a partnership accounting. The widow died during the pendency of the action, and appellant, as executor of her estate, was substituted in her stead.

During the time Wedge and Rosing were associated in business together they acquired various tracts of real estate, some of them in the course of business, and others as a speculation. They had no written agreement or articles of co-partnership, either as to the gasoline and oil business or as to any of their real estate dealings. A stipulation

IN THE

AMOUNT OF \$100.00

SECOND DEGREE

805 A. 18

County Court, 1888

ALBANY, N.Y.  
JANUARY 1, 1888  
JAMES A. ROSS

U. S. DEPT. OF JUSTICE, at Albany, N.Y.  
The Estate of JAMES A. ROSS, deceased,  
and as Executor of the  
Estate of JAMES A. ROSS, deceased,  
vs.  
WILLIAM A. ROSS,  
Defendant.

DOVE, J. J.

George S. Wedge, of the County of Albany, State of New York, do hereby certify that

he and William A. Ross, deceased, had a partnership in the business

of selling and distributing gasoline, oils and products connected

therewith. The business was conducted at the station of Albany, N.Y.

the death of George S. Wedge, defendant, as Executor of his estate, and

Wm. M. Wedge, surviving widow, instituted suit in the County Court of

Albany County against appellee as surviving partner, for a partnership

accounting. The widow died during the pendency of the action, and ap-

appellee, as executor of her estate, was substituted in her stead.

During the time Wedge and Rossing were associated in business to-

gether they received various tracts of real estate, some of them in the

course of business, and others as a speculation. They had no written

agreement or articles of co-partnership, either as to the business and

all business or as to any of their real estate dealings. A judicial

was filed in the cause disposing of all matters in dispute except a transaction in relation to 190 acres known as the Druce farm, which appellant claims was a direct transaction of the Antioch Oil Company partnership, and that he is entitled to reimbursement for one-half of the initial payment of \$15,000.00 made by George S. Wedge on the purchase price. Appellee claims the transaction was not that of the Antioch Oil Company partnership, but was a separate, independent matter in which, after Wedge had contracted for the farm individually, he, Rosing, was let into the transaction under an agreement that when the farm was sold, Wedge was to first take his \$15,000.00 out of the proceeds, and the profits, if any, were to be equally divided between them. The special master to whom the cause was referred filed a report finding in favor of the contentions of appellee. Exceptions to the report were overruled, a decree in accordance with the master's findings was entered, and this appeal followed.

The purchase price of the farm was \$47,500.00, of which Wedge paid \$15,000.00. When the deal was finally closed on March 1, 1927, the title was conveyed by Druce to George S. Wedge and William A. Rosing, who executed a promissory note, and a trust deed, to secure the payment of the remainder of the purchase price on or before five years thereafter. Interest on the mortgage of \$1950.00 per annum and the taxes of \$300.00 to \$325.00 each year, aggregating approximately \$18,000.00 to \$19,000.00, were paid by checks of the Antioch Oil Company. On two occasions, the last one in 1936, the semi-annual interest installment was paid by Rosing. He testified the company funds were low when he made the last payment and "Wedge would not pay any more interest, he quit;" that there were no distributions of cash in 1935 and 1936, because they had installed a new station at Fox Lake, which, beside paying interest on the Druce farm, took more than they made in profits.



The inventory filed in the probate court by appellee as surviving partner, lists the Druce farm, as encumbered by the trust deed mentioned. The estimated value of the premises is placed at \$14,250.00, with no net value to the estate. Some time thereafter, in 1937, Druce filed a suit to foreclose the trust deed. The matter was compromised by a reconveyance of the farm to Druce and a cash payment of \$7000.00, of which the estate of George S. Wedge paid one-half, and Rosing paid the other half. The instant suit was filed about one month later.

Druce testified the farm was sold to George S. Wedge and William A. Rosing. T.J. Stahl, a real estate agent, testified, in substance, that he represented Druce in the sale of the farm; that on August 28, 1926, he made the sale to Wedge. He referred to his sales sheet for that month showing the transaction. He further testified that at the time of such sale he dealt only with Wedge; that thereafter and before the sale was closed on March 1, 1927, he talked with Wedge at Antioch in regard to the closing; that Wedge told him he was going to close up soon and that Rosing was going into the deal from that time on; that he (Wedge) was buying the property, but Rosing was going to be in the deal from then on as to any earnings; that Wedge told him he was putting in the down payment of \$15,000.00, and did in fact put it in; and that Wedge further said that in case there was a sale he was to get his money first and then Rosing was to be in on the deal in all the profits.

So far as the abstract discloses, Druce's testimony that the farm was sold to Wedge and Rosing may have been based solely upon the fact that when the transaction was finally closed, the deed was made to both of them. Neither he nor anybody else testified to any fact that contradicts or tends to impeach the testimony of Stahl. It is not inherently improbable, and the court could not, without committing error, reject it. (*Mammina v. Homeland Insurance Co.*, 371 Ill. 555.)



Wedge and Rosing owned a lot back of the First National Bank in Antioch and a farm known as the Nelson farm. During Wedge's lifetime appellee traded his half interest in the lot to Wedge for Wedge's half interest in the Nelson farm and appropriate deeds were executed. Rosing testified that none of the three transactions as to the Druce farm, the lot back of the bank, or the Nelson farm were operated directly in connection with the oil company business; that they had no stations on them, and they did not use them in any way in connection with the business; that an eighty acre tract in Wisconsin, about two miles from Antioch, and known as the Paschen place, was deeded directly to the witness in satisfaction of a debt to the oil company, and the title was still in his name; that the title to another one acre tract known as the New Munster property with a road house and gasoline station on it was in his name; that the interest in the oil company was taken in payment or part payment of an account, and the oil company has an equity in it of about \$900.00; and that the witness bought a mortgage on it to protect their interest.

Upon being recalled, Rosing testified, over objection, that there were no other partnerships in real estate like the one in the Druce farm; that he did not have anything at all to do with the purchase of the Druce farm at the time it was purchased; and that something was said to him by Wedge after August, 1926, and <sup>before</sup> the date of the note and trust deed, as to the basis on which he might become a partner in the Druce farm. No attempt was made to show what Wedge said to him. If, as claimed by appellant, this testimony was incompetent, that fact does not constitute reversible error. The testimony of Stahl was sufficient to show the character of the transaction, and it is presumed the chancellor did not consider any incompetent testimony admitted by the master.

Wedge and Rosing owned the land for some time.

in Antioch and a farm known as the Wedge farm.

lifetime applies to the land in the Wedge farm.

Wedge's half interest in the land was sold to Rosing.

executed. Rosing testified to a sale of the land to Rosing.

the Rosing farm, the lot of the land, and the Rosing farm.

operated directly in connection with the Rosing farm.

they had no station on the land, and they did not have any in

connection with the business; that in the Rosing farm, the

about two miles from Rosing, and that in the Rosing farm, was

deduced directly to the witness in a letter from the oil

company, and the title was still in the name of the Rosing

one acre tract known as the Rosing farm, and the Rosing farm

gasoline station on it was in the name of the Rosing farm.

company was taken in payment of part of the account, and the

oil company was in equity in it of the Rosing farm, and that the Rosing

bought a mortgage on it to protect their interest.

Upon being recalled, Rosing testified that, in the Rosing farm, there

were no other partnerships in the Rosing farm, and the Rosing farm

farm; that he did not have anything to do with the purchase of

the Rosing farm at the time it was purchased, and that nothing was said

to him by Wedge after August, 1905, and that he had the note and trust

deed, as to the basis on which he had the Rosing farm, and the Rosing farm

farm. He attempted to show that the Rosing farm was in the Rosing farm.

by appellant, this testimony was contradicted, and it does not consti-

tute reversible error. The testimony of the Rosing farm is sufficient to show the

character of the transaction, and it is not necessary to consider any in-

consider any inconsistent testimony submitted by the Rosing farm.



When the competent testimony is summarized it shows that Wedge and appellee owned various pieces of real estate together at different times. Some of them, including the tract where their business was located, were owned and operated in connection with the Antioch Oil Company partnership. Other tracts which they owned, and in connection with which they engaged in business activities together, had no connection with that business. The testimony falls far short of showing that the Druce farm belonged to that partnership as an asset of the business. While appellee inventoried it in the probate court as a partnership asset, it is apparent that his interpretation of the meaning of the term "partnership" included everything that he and Wedge owned and operated together. In his testimony he repeatedly spoke of their owning tracts as partners, which he testified had no connection with the Antioch Oil Company, and he admits a partnership in the Druce farm under a like state of facts. The master and the chancellor denominated it as a joint venture, but whether it was the one or the other we regard as of no consequence. The test, by the issue made by the pleadings, is whether its ownership was directly connected with the Antioch Oil Company partnership. A significant circumstance in this case is that when the \$7000.00 was paid Druce, the record does not show that appellant made any claim such as he now makes, but contributed one-half the amount. If he felt that appellee was liable for half of the \$15,000.00, it is not suggested why he did not call upon him to pay it at that time, and save the estate from paying the \$3500.00 which he paid as executor.

Here, as in *Nehrkorn v. Tissier*, 352 Ill. 181, there is no showing that the Druce farm was purchased with partnership money or for partnership purposes of the Antioch Oil Company, or that it was entered on its books as the property of that partnership, or that there was a contract or understanding between the partners in that business that the farm was

Then the respondent testified that he had been in the  
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as executor.

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or understanding that the respondent had been in the respondent's office.

the property of that partnership. In that case the court held that in the absence of any one or more of these controlling factors to show that the property was partnership property, a finding that it was such could not be sustained. The opinion cites Robinson Bank v. Miller, 153 Ill. 244, and Alkire v. Kahle, 123 id. 496.

The fact that the interest and taxes were paid for a number of years out of the Antioch Oil Company funds we do not regard as showing the farm was an asset of that business. Each partner had an equal share in the business. Rosing testified he never at any time that he knew of withdrew from the oil company business any money when a like amount was not paid to Wedge. The mechanics of each one withdrawing from the business an amount equal to half the interest or taxes and then individually applying the money to the payment thereof, would have no difference in effect than paying the amount in one sum from the oil company funds.

In Blakeslee v. Blakeslee, 265 Ill. 48, it was sought to establish the real estate involved was partnership property. One of the partners owned the property. At the time the partnership was entered into the other partner agreed to purchase a one-half interest in the real estate and the articles of agreement so provided. The real estate was actually used by the partnership in conducting its business of a general warehouse and storage. The partnership books showed the real estate was treated as a partnership asset. Yet, notwithstanding these facts the court held the real estate was not a part of the partnership assets.

In Robinson Bank v. Miller, supra, the court said:

"When the intention of the partners to convert the land into firm property is inferred from circumstances, the circumstances must be such as do not admit of any other equally reasonable and satisfactory explanation. (Parsons on Part. sec. 267.) And where it is sought to show a conversion of land into personalty by agreement of the partners, such agreement must be clear and explicit. (17 Am. & Eng. Enc. of Law, page 954, and cases cited.)"



The mere fact that Wedge and Rosing were partners in the Antioch Oil Company did not make real estate purchased by one of them partnership property of that partnership. To make it so it must have been purchased with the partnership funds for the partnership purposes, or at least there must have been one of these elements present. (Thanos v. Thanos, 313 Ill. 499, citing the Blakeslee case, the Robinson Bank case and the Alkire case, supra.)

The fact that the grantees in the deed were not mentioned as partners therein, is a factor indicating the real estate was not to be considered as a transaction of the Antioch Oil Company. (Mehrkorn v. Tissier, supra; Robinson Bank v. Miller, supra.)

The evidence not only fails to sustain the contentions of appellant, but fully justifies the findings of the master and the decree of the chancellor. The decree is accordingly affirmed.

Decree affirmed.

The mere fact that the ship and her cargo were partners in the litigation of the Old Company did not make them real estate, as alleged by one of them. The ship property of that character is, to all intents and purposes, as if it had been purchased with the partnership funds for the partnership purposes, or at least there must have been one of these elements present. (Thames v. Thompson, 315 F. 2d 820, citing the English case, The Robinson Bank case and the Alaska case, supra.)

The fact that the partners in the bank were not mentioned as partners therein, is a factor indicating the real estate was not to be considered as a transaction of the Robinson Old Company. (Winkler v. Thaler, supra; Robinson Bank v. Miller, supra.)

The evidence not only fails to sustain the conclusion of appeal, but, but fully justifies the findings of the master and the decree of the chancellor. The decree is accordingly affirmed.

Reversed and affirmed.

314 I.A. 204

Gen. No. 9643.

Agenda No. 1.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT.  
FEBRUARY TERM, A. D. 1942.

JOHN JOHNSON, Administrator )  
of the Estate of Arthur John- )  
son, Deceased, )  
Appellant, )  
vs. )  
EDWARD MUELLER, )  
Appellee. )

Appeal from  
Circuit Court,  
Will County.

WOLFE,-- J.

John Johnson, as Administrator of the Estate of Arthur Johnson, deceased, started a suit in the Circuit Court of Will County, against Edward Mueller in which he claimed damages for the wrongful death of Arthur Johnson, the plaintiff's intestate. The complaint consisted of one count and charged the defendant with negligence in one or more of the following acts. First, the violation of the State Statute by parking his car on a two-lane paved State Highway with no tail light burning. Second, with common law negligence in his failure





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to signal that his car was so parked; and third, the negligent manner of operating and the controlling of his car. It is then alleged, that as a direct and proximate result of such negligence, that the car in which the plaintiff's intestate was riding, collided with the car of the defendant, and that the plaintiff's intestate sustained serious injuries to his head, and as a direct and proximate result of such injuries, he became insane and while in a state of insanity, and as a proximate result of said collision and injuries, the plaintiff's intestate committed suicide. The complaint also alleged that just prior to, and at the time of the collision in question, the plaintiff's intestate was in the exercise of due and ordinary care for his own safety.

The defendant, Edward Mueller, filed his answer in which he denied all the material allegations of the complaint. The case was submitted to a jury, who found the issues in favor of the defendant. The plaintiff entered a motion for a new trial, which was overruled by the trial court. Judgment was entered on the verdict in favor of the defendant. It is from this judgment that the appeal is prosecuted.

The appellant, in his argument says: "The reversible errors which we believe the record to contain, all pertain to that phase of the case dealing with the nature (i.e., cause) of the decedent's insanity and the actuating force which resulted in his suicide. Because

to signal that his car was a partner; and it is then alleged, of operating and the controlling of his car. It is then alleged, that as a direct and proximate result of such negligence, and the car in which the plaintiff's intestate was riding, collided with the car of the defendant, and that the plaintiff's intestate sustained serious injuries to his head, and as a direct and proximate result of such injuries, he became insane and while in a state of insanity, and as a proximate result of said collision and injuries, the plaintiff's intestate committed suicide. The complaint also alleged that just prior to, and at the time of the collision in question, the plaintiff's intestate was in the exercise of his ordinary care for his own safety.

The defendant, Edward Mueller, filed his answer to which he denied all the material allegations of the complaint. The case was submitted to a jury, who found the issues in favor of the defendant. The plaintiff entered a motion for a new trial, which was overruled by the trial court. Judgment was entered on the verdict in favor of the defendant. It is from this judgment that the appeal is prosecuted.

The appellant, in his argument says: The reversible errors which we believe are rooted in the record, are that phase of the case dealing with the nature (i.e., cause) of the intestate's insanity and the testimony of the witnesses in the suicide. Because

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of this we shall devote little space to the question of liability insofar as it may rest on the facts incident to the collision between the automobiles. It should be sufficient to point out that this Court, in an opinion by Justice Wolfe, affirming the judgment rendered in the case in which Charles Johnson, the father, sued for injuries received in the same accident, said: We have reviewed the evidence and it is our opinion that it sustains the contention of the appellee that at the time of the collision of the cars there was no tail light burning on the appellant's car, and the snow on the shoulder of the road was not deep enough to prevent the appellant from driving his car off of the slab onto the dirt shoulder of the road." (Johnson v. Mueller, Gen. No. 8632, Abs. Dec. 273, Ill. App.637.)

The appellant has omitted a very pertinent part of that paragraph which precedes the part that he quotes. It will be recalled that in the former case the plaintiff was successful in his suit, and the jury found the issues in favor of the plaintiff and in that connection the language quoted by the appellant was used, but is preceded by the following: "These are questions of fact to be decided by the jury, and unless this Court can say that the verdict is manifestly against the weight of the evidence, we would not be justified in reversing the case for the reason that this Court on a review of the evidence, might reach a different conclusion from that of the trial court and jury."

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The appellant has omitted a very pertinent part of that paragraph which precedes the part that he quotes. It will be recalled that in the former case the plaintiff was successful in his suit, and the jury found the issues in favor of the plaintiff and in that connection the language quoted by the appellant was used, but as preceded by the following: "These are questions of fact to be decided by the jury, and unless this Court can say that the verdict is manifestly against the weight of the evidence, we would not be justified in reversing the case for the reason that this Court on a review of the evidence, might reach a different conclusion from that of the trial court and jury."

In the former case Francis Johnson, a son of the plaintiff, testified that he was riding in the car with his father and brother and he did not see any tail light on the Mueller car, and that there wasn't any snow on the shoulder of the road to amount to anything.

John Johnson, a son of Charles Johnson, testified that he went down to the scene of the accident the next day, and there was only about two inches of snow on the shoulder of the pavement.

Mike Walsh testified that he was following the Johnson car and bumped into it slightly after the accident; that he could not say whether or not a tail light was on the Mueller car at the time, and that there might have been some snow on the shoulder of the road.

Charles Johnson, the plaintiff, testified that he was riding in the front seat of the car looking straight ahead and he saw no tail light on Mueller's car.

Mrs. Will Murphy testified that she was riding in another car and approached the Mueller car and saw that the tail light of the car was burning and saw Mr. Mueller at the car, putting a blanket over the radiator; that they drove on past the car, and in her estimation, there was about two feet of snow on the shoulder of the road.

Mrs. Mollie Lawlor who was in the same car with Mrs. Murphy testified to practically the same thing. Edward Mueller, the defendant, testified that the tail light of his car was burning before, and at the

In the former case Francis Johnson, a son of the plaintiff, testified that he was riding in the car with his father and brother and he did not see any tail light on the Mueller car, and that there wasn't any snow on the shoulder of the road at the time.

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Charles Johnson, the plaintiff, testified that he was riding in the front seat of the car looking straight ahead and he saw no tail light on Mueller's car.

Mrs. Will Murphy testified that she was riding in another car and approached the Mueller car and saw that the tail light of the car was burning and saw Mr. Mueller at the car, putting a cigarette over the radiator; that they drove on past the car, and in her estimation, there was about two feet of snow on the shoulder of the road.

Mrs. Mollie Lawler who was in the same car with Mrs. Murphy testified to practically the same thing. Edward Mueller, the defendant, testified that the tail light of his car was burning before, and at the

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time of the collision, and that the snow on the shoulder of the road at the place where the accident occurred, was between two and three feet deep. This was the testimony on which the jury based their verdict of whether the tail light on the Mueller car was burning, and as to the depth of the snow on the side of the road. The jury evidently believed the witnesses for the plaintiff who said that there was only a small amount of snow on the shoulder of the road, and that Mueller could very easily have driven his car off onto the shoulder and prevented the accident.

In the present case Francis Johnson testified that he was in the car with his father and brother, and that the tail light on Mr. Mueller's car was not burning, and that the snow on the side of the road was slight. Mr. William Glenney was not called at the first trial, but testified at this trial that he remembered going to the scene of the accident, and in his opinion there was about four inches of snow on the shoulder of the pavement. He said his attention had not been called to the amount of snow since the time of the accident in 1930, up until the time he testified, and that he only knew he was going to be a witness a few days before he testified. He did not testify in regard to the tail light.

John Johnson, the present administrator bringing this suit, testified that he was not at the scene of the accident when it occurred, but drove down the next day, and that in his opinion, there was about

time of the collision, and that this was on the shoulder of the road at the place where the accident occurred, was about two and three feet deep. This was the testimony of which the jury heard their verdict of whether the tail light on the car was broken, and as to the depth of the snow on the side of the road. The jury evidently believed the witness for the plaintiff, and that there was only a small amount of snow on the shoulder of the road, and that Mueller could very easily have driven his car off the shoulder and prevented the accident.

In the present case the jury heard testimony that he was in the car with his father and brother, and that the tail light on Mueller's car was not burning, and that the snow on the side of the road was slight. Mr. William James was also called at a first trial, but testified at this trial that he remembered going to the scene of the accident, and in his opinion there was about two inches of snow on the shoulder of the pavement. He said his attention was not been called to the amount of snow since the time of the accident, in 1930, up until the time he testified, and that he only knew he was going to be a witness a few days before he testified. He did not testify in regard to the tail light.

John Johnson, the present administrator bringing this suit, testified that he was not at the scene of the accident when it occurred, but drove down the next day, and that in his opinion, there was about



three inches of snow on the shoulder of the road. These are the only witnesses that testified for the plaintiff, as to the depth of the snow on the shoulder of the road, or as to whether the tail light of the Mueller car was burning.

On behalf of the defendant, Mr. George Kuhn testified that there had been several hard snows previous to the accident, and that the right of way had been cleaned off, and in his opinion, the snow on the shoulder of the road at and near the place where the accident occurred, was four and maybe five feet deep in places.

Joseph Murphy testified that he had occasion to travel this road frequently and knew its condition on the night of the accident, and that there had been several snows previous, and that in his opinion, the snow was at least a foot and a half to three feet deep, and it covered both shoulders of the road.

Harold Barton testified that he lived close to the scene of the accident; that he knew the condition of the roads generally in that community, and that on the night of the accident, at the place in question, in his opinion the snow was from a foot and a half to three feet deep; that there had been several hard snows previous to the accident.

Mr. Edward Pester testified that he drove down to the scene of the accident the next day, and observed the condition of the shoulders with reference to the snow, and in his opinion that

three inches of snow on the shoulder of the road. These are the only witnesses that testified for the plaintiff, as to the depth of the snow on the shoulder of the road, or as to whether the rail light of the Mueller car was burning.

On behalf of the defendant, Mr. George Hahn testified that there had been several hard snows previous to the accident, and that the right of way had been cleaned off, and in his opinion, the snow on the shoulder of the road at and near the place where the accident occurred, was four and maybe five feet deep in places.

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Mr. Edward Foster testified that he drove down to the scene of the accident the next day, and observed the condition of the shoulders with reference to the snow, and in his opinion that

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the snow was from two to four feet deep.

Mr. Edward Mueller testified that in his opinion the snow on the shoulder at the scene of the accident was three feet deep, and the tail light of his car was burning.

Mrs. Leo Murphy testified that she and Mrs. Mollie Lawlor were coming down the road; that she was driving her car on the night of the accident in question; that as she approached the car of the defendant, she noticed a red light, which was the tail light of the defendant's car, and it was burning; that she pulled her car to the left of his car, stopped about a minute, and saw that it was Mr. Edward Mueller's car; that he was blanketting the radiator; that the snow-ploughs had gone through and pushed the snow from the highway onto the shoulder, and in her opinion it varied from two to three feet in depth.

Mrs. Mollie Lawlor testified that she was with Mrs. Leo Murphy, as she drove down the road and approached the car of Edward Mueller; that the first thing they noticed was the red tail light burning on Mueller's car; that Mrs. Murphy drove her car to the left around the Mueller car; that they noticed Mueller standing by the side of his car, and that the radiator was steaming; that they had had severe snowstorms prior to the accident, and in her opinion, the snow on the shoulder of the highway was practically three feet deep.

the snow was from two to four feet deep.

Mr. Edward Mueller testified that in his opinion the

snow on the shoulder of the road was about three feet

deep, and the tail light of his car was visible.

Mrs. Le. Murphy testified that she and Mrs. Nellie Lawlor

were coming down the road; that she was driving her car on the right

of the accident is possible; that as she approached the car of the

defendant, she noticed a red light, which was the tail light of the

defendant's car, and it was turning; that she pulled her car to the

left of his car, stopped about a minute, and then it was

Edward Mueller's car; that he was frightened by the radiator; that she

saw-plow had gone through and pushed the car back to the

onto the shoulder, and in her opinion it would take up to three

feet in depth.

Mrs. Nellie Lawlor testified that she was with Mrs. Lawlor

Murphy, as she drove down the road and approached the car of Edward

Mueller; that the first thing they noticed was the red tail light

burning on Mueller's car; that Mrs. Murphy drove her car to the left

around the Mueller car; that they noticed the radiator standing by the

side of his car, and that the radiator was standing, that the

had severe snow, and that to the best of her knowledge, and in her opinion, the

snow on the shoulder of the highway was about five times foot deep.

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It is upon this evidence that the jury, in the present case, based their verdict and evidently believed that the tail light of the defendant, Mueller's car was burning, and that the snow on the shoulder of the road next to the pavement was at least two to four feet deep.

That the defendant's car was steaming and his vision obscured by the overheating of his engine, is not disputed in this case. The only disputed questions of fact, as to how the accident occurred, is whether the defendant had the tail light on his car burning at the time of the accident, and whether the depth of the snow on the shoulders of the highway was deep enough that it was impractical for him to drive his car off of the paved part of the highway onto the shoulder of the road. These were questions of facts for the jury to decide. They evidently gave more credence to the testimony of the defendant's witnesses than they did to those of the plaintiff. From a review of the evidence, we are clearly of the opinion that the weight of the evidence supports the contention of the defendant, that the snow was from eighteen inches to three feet deep on the side of the pavement, and that the tail light of his car was burning.

It is contended that the defendant violated the provision of Section 185 of Chapter 95<sup>1</sup>/<sub>2</sub> of the Illinois Revised Statute. That part of the Statute pertinent to the issues herein, is as follows:  
"Upon any highway outside of a business, resident or suburban district

It is upon this evidence that the jury, in the present case, based their verdict and evidently believed that the defendant's car was driving and that the car was on the right of the road next to the pavement was as low as four feet high. That the defendant's car was a sedan and its weight supported by the overhanging of the engine, so as to be in this case. The only disputed questions of fact, in the accident case, is whether the defendant had the full right of the car running at the time of the accident, and whether the depth of the snow on the highway was deep enough that it was impossible for him to have his car off the paved part of the highway and on a shoulder of the road. These were questions of fact for the jury to decide. They evidently gave more evidence to the testimony of the defendant's witnesses than they did to that of the plaintiff. From a review of the evidence, we are clearly of the opinion that the weight of the evidence supports the conclusion of the defendant, that the snow was from eighteen inches to three feet deep on the right of the pavement, and that the tail light of his car was burning.

It is contended that the defendant violated the provision of Section 135 of Chapter 93 of the Illinois Vehicle Code. That part of the Statute pertinent to the issues herein, is as follows:

"Upon any highway outside of a business, residence or suburban district

9.

no person shall stop, park, or leave standing any vehicle, whether attended or unattended upon a paved, or improved, or a main travelled part of the highway when it is practical to stop, park, or so leave such vehicle off such part of said highway, etc." When a car is stopped upon a highway, no hard and fast rule can be laid down as to whether it would be practical to drive off onto the shoulder, but each case must be decided upon the evidence as presented, as a question of fact for the jury to determine. Evidently the jury, by their verdict, has determined this question in favor of the defendant.

It is contended by the appellee that the plaintiff's intestate was guilty of contributory negligence, as a matter of law. The appellee was driving his car down a paved highway, and as before stated, stopped on account of his engine overheating and steam escaping from the radiator, and obscuring his vision through the windshield. He stopped upon the highway and it is conceded by everyone that there was snow on the ground. It is shown by a preponderance of the evidence that the tail light of the defendant's car was burning. The evidence is all to the effect that the driver of the car was looking towards the defendant's car, but did not see it in time to avoid a collision, and drove into the back end of the car. The owner of the car in which Arthur Johnson was riding and driving, testified that it was not exactly a clear night, but that he could see well, and his windshield was clear.

no person shall stop, park, or leave standing any vehicle, whether attended or unattended upon a paved, or improved, or a main travelled part of the highway when it is practicable to stop, park, or so leave such vehicle off such part of said highway, etc." When a car is stopped upon a highway, no hand and foot brake can be laid down as to whether it would be practicable to drive off onto the shoulder, but each case must be decided upon the evidence as presented, as a question of fact for the jury to determine. Evidently the jury, by their verdict, has determined this question in favor of the defendant. It is contended by the appellee that the plaintiff's interstate was guilty of contributory negligence, as a matter of law. The appellee was driving his car down a paved highway, and before stated, stopped on account of his engine overheating, and steam escaping from the radiator, and observing his vision through the windshield. He stopped upon the highway and it is conceded by everyone that there was snow on the ground. It is shown by a preponderance of the evidence that the tail light of the defendant's car was burning. The evidence is all to the effect that the driver of the car was looking towards the defendant's car, but did not see it in time to avoid a collision, and drove into the back end of the car. The owner of the car in which Arthur Johnson was riding and driving, testified that it was not exactly a clear night, but that he could see well, and his windshield was clear.



If this is true, whether the defendant's car had a tail light on it or not, it seems that a careful driver would observe this car standing upon a highway with shoulders covered with snow, in time to avoid a collision. Other people travelling in the same direction as the plaintiff and defendant, testified that they saw the car when they were between five and six hundred feet away from it; that they saw the red tail light burning, drove on and pulled out to the side of the car and stopped to see what was the matter, and observed Mr. Mueller holding a laprobe or blanket over the steaming radiator. The jury, on the evidence introduced by both plaintiff and defendant, would be justified and probably did find that the negligence of the plaintiff's intestate contributed to his injuries.

From a review of the evidence in this case, it is our conclusion that if the jury had found the issues in favor of the plaintiff, the verdict could not stand, as it would be against the manifest weight of the evidence. Before the plaintiff could recover, it was necessary to prove that at, and just prior to the accident in question, that the deceased was in the exercise of due and ordinary care for his own safety, and that the defendant was guilty of negligence that was the proximate cause of the injury to the plaintiff's intestate. The jury, by their verdict, have found against the plaintiff, relative to these issues.

It is true, whether the defendant's car was on the left or right, it seems that a careful driver would have been able to avoid a collision with the plaintiff's car. Other people traveling in the same direction as the plaintiff and defendant, testified that they saw the car when they were between five and six hundred feet away from the plaintiff's car. The red tail light of the defendant's car was visible on the side of the car and stopped to see what was the matter, and observed it. Mueller holding a license on plaintiff over the steering position. The jury, on the evidence introduced by the plaintiff and defendant, would be justified and probably did find that the negligence of the plaintiff's estate constituted the injury.

From a review of the evidence introduced, it is our conclusion that if the jury had found the facts in favor of the plaintiff, the verdict could not stand, as it would be against the manifest weight of the evidence. Before the plaintiff could recover, it was necessary to prove that at, and just prior to the accident in question, that the deceased was in the exercise of due and ordinary care for his own safety, and that the defendant was guilty of negligence that was the proximate cause of the injury to the plaintiff's estate. The jury, by their verdict, have found against the plaintiff, relative to these issues.

11.

The appellant's main argument is directed to the complained of errors of the trial court in the admission of expert testimony relative to the insanity of plaintiff's intestate. In view of the fact that we have found that the plaintiff failed to maintain his case by a preponderance of the evidence, that plaintiff's intestate was in the exercise of due care for his own safety, and not guilty of negligence that was the proximate cause of his injuries, and that the defendant was guilty of negligence, as charged in his complaint, the injuries that plaintiff's intestate may have received by reason of the collision, becomes immaterial in the case, and for that reason we have not considered the assignment of errors relative to this part of the case.

Complaint is made in regard to the defendant's given instruction No. 11. We do not approve of the language as used therein, but in view of our statement, relative to the evidence, we think this instruction becomes immaterial, as it does not relate to the negligence of the defendant, or to the contributory negligence of the plaintiff, but only as to the injuries sustained by the deceased, and the connection of such injuries with the accident in question.

The Judgment of the Trial Court is hereby affirmed.

Affirmed.

The appellant's main argument is directed to the assignment of errors of the trial court in the instruction of the jury relative to the insanity of plaintiff's intestate. In view of the fact that we have found that the plaintiff is not entitled to recover on the ground of the negligence of the intestate, and that plaintiff's intestate was in the exercise of due care for his own safety, and not guilty of negligence that was the proximate cause of his injuries, and that the defendant was guilty of negligence, as charged in his complaint, and that the plaintiff's intestate may have received by reason of the collision, becomes immaterial in the case, and for that reason we have not considered the assignment of errors relative to that part of the case. Complaint is made in regard to the testimony given in instruction No. 11. We do not approve of the language as used therein, but in view of our statement relative to the evidence, we think this instruction becomes immaterial, as it does not relate to the negligence of the defendant, or to the contributory negligence of the plaintiff, but only as to the injuries sustained by the intestate, and the connection of such injuries with the accident in question. The judgment of the Trial Court is hereby affirmed. Affirmed.

314 I.A. 204<sup>2</sup>

Gen. No. 9741.

Agenda No. 4.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT.  
FEBRUARY TERM, A. D. 1942.

ELIZABETH M. JONES,  
(Plaintiff) Appellee,

vs.

ILLINOIS IOWA POWER COMPANY,  
a corporation,  
(Defendant) Appellant.

Appeal from  
Circuit Court  
of Peoria County.

WOLFE,-- J.

Elizabeth M. Jones brought suit in the Circuit Court of Peoria County, against the Illinois Iowa Power Company for personal injuries which she alleged she had received while riding as a guest in an automobile owned and driven by Ray Bush, when his car ran into the rear of one of the defendant's passenger buses. The complaint consists of three counts in which it is alleged that the plaintiff was riding as a guest in the Bush car and that the defendant was operating the bus in question, in its business of transporting

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Gen. No. 0741

APPELLATE COURT OF ILLINOIS  
SECOND DIVISION  
FEBRUARY 17, A. D. 1924

Appeal from  
Circuit Court  
of Peoria County.

ELIZABETH T. JONES,  
Plaintiff, Appellee,  
vs.  
ILLINOIS TOWNE POWER COMPANY,  
a corporation,  
Defendant, Appellant.

WOLFE, J.

Elizabeth T. Jones brought suit in the Circuit Court of Peoria County, against the Illinois Towne Power Company, for her alleged injuries which she alleged she had received while riding as a guest in an automobile owned and driven by her husband, when his car ran into the rear of one of the defendant's passenger buses. The complaint consists of three counts in which it is alleged that the plaintiff was riding as a guest in the bus car and that the defendant was operating the bus in question, in the business of transporting

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passengers for hire, and that the plaintiff, at all times, was in the exercise of due and ordinary care for her own safety, and that by reason of the negligence of the defendant, she was injured; that the plaintiff was riding in a northerly direction on Adams Street; that Adams Street intersects Homestead Avenue; that Adams Street runs practically north and south, and Homestead Avenue practically east and west; that the bus made a sudden stop and the car, in which she was riding, crashed into it. The second count alleges that the defendant drove its motor-bus past the intersection of Adams and Homestead Street and negligently made a sudden stop near the center of the intersection, and as a result thereof, the collision occurred. Count 3 alleged that the defendant violated Section 138 Chapter 95<sup>1</sup>/<sub>2</sub> Illinois Revised Statutes, in that the defendant did not stop its bus within twelve inches of the right-hand curb, as required by the statute, and that such negligence caused the collision in which the plaintiff was injured.

The defendant filed its answer in which it admitted the allegations of the complaint with reference to the location of the accident, its ownership and operation of the bus, and its business of transporting passengers for hire at the time and place of the accident, but denied each and every other allegation contained in all of the counts of the complaint. The answer admitted the existence of the sections of the statute set forth in count 3 of the





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complaint, but denied that it violated said section of the statute within the intent of the section, and the legislature in the enactment thereof, and denied that such statute applied to the defendant operating as a public utility under the laws of the State of Illinois.

The case was tried before a jury, and at the close of the plaintiff's evidence, the defendant moved the Court to instruct the jury to find the defendant not guilty. This motion was denied. At the close of all of the evidence in the case a similar motion was presented to the Court, and this motion was also denied. The jury returned a verdict finding the defendant guilty and granting the plaintiff damages in the amount of \$1,500.00. The defendant moved for judgment notwithstanding the verdict, which was denied. They then entered a motion for a new trial, which was likewise denied, and judgment was entered in favor of the plaintiff on the verdict. It is from this judgment that the appeal is prosecuted.

The evidence shows that north Adams Street runs approximately north and south and Homestead Avenue runs nearly east and west, and intersects north Adams, and at this intersection the collision in question occurred; that the plaintiff and her husband, Archie W. Jones, were riding in the automobile of Ray Bush, and that Mr. Bush was driving the car. Mrs. Jones was sitting next to Mr. Bush and her husband was at her right, all in the front seat of the automobile; that these three

complaint, but denied that it violated any statute or ordinance within the intent of the section, and the defendant moved for judgment thereon, and denied that such statute or ordinance was operating as a public utility under the laws of the State of Illinois. The case was tried before a jury, and the close of the plaintiff's evidence, the defendant moved the Court to instruct the jury to find the defendant not guilty. This motion was denied. At the close of all of the evidence in this case a similar motion was presented to the Court, and this too a was also denied. The jury returned a verdict finding the defendant guilty and granting the plaintiff damages in the amount of \$1,000.00. The defendant moved for judgment notwithstanding the verdict, which was denied. They then entered a motion for a new trial, which was likewise denied. Judgment was entered in favor of the plaintiff on the verdict. It is from this judgment that the appeal is prosecuted.

The evidence shows that North Adams Street runs north and south and West and North Adams Avenues runs nearly east and west, and intersect North Adams, and at this intersection the collision in question occurred; that the plaintiff and her husband, Louis A. Jones, were riding in the automobile of Ray Jones, and that Mrs. Jones was sitting in the front seat next to Mr. Jones and her husband was at her right, all in the front seat of the automobile; that there were

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people had been together all of the afternoon, and that the accident occurred at 7:30 or 8:00 o'clock in the evening on Easter Sunday April 9, 1939; that the regular route for the bus was north on Adams Street; that the Bush car drove onto Adams Street approximately thirteen blocks south of Homestead Avenue, and followed directly behind the bus at approximately eighteen or twenty feet from the time they drove onto Adams Street, until the collision occurred; that the bus stopped from five to seven times within these thirteen blocks; that the Bush car at each time stopped back of the bus; that the traffic on Adams Street at this time was very heavy, and within the thirteen blocks Bush could not pass the bus on account of the oncoming traffic; that the bus stopped at, or in the intersection of Homestead Avenue, and that the defendant attempted to pass the bus, but on account of the traffic, could not do so, and drove into the back of the bus, and that the plaintiff was injured by reason of the collision; that there were cars parked on the right of Adams Street; that Adams Street is paved with a twenty foot concrete slab in the center, and thirteen feet of brick on each side of the pavement; that the regular traffic lane of the bus was on the concrete; that each time it stopped, prior to the collision, it drove the right wheels of the bus off of the concrete; that at the time of the collision in question, there were lights inside the bus; that the headlights were burning, and that there were red lights at

people had been together all in the afternoon, and that the accident occurred at 7:30 or 8:00 o'clock in the evening on Easter Sunday, April 9, 1933; that the regular route for this line was north on Adams Street; that the Buick car drove onto Adams Street approximately thirteen blocks south of Homestead Avenue, and followed directly behind the bus at approximately eighteen or twenty feet from the rear of the bus; that the Buick car stopped from Adams Street, until the collision occurred; that the Buick car at five to seven times within these thirteen blocks; that the Buick car at each time stopped back of the bus; that the collision on Adams Street at this time was very heavy, and within the thirteen blocks Buick could not pass the bus on account of the oncoming traffic; that the bus stopped at, or in the intersection of Homestead Avenue, and that the defendant attempted to pass the bus, but on account of the traffic, could not do so, and drove into the back of the bus, and that the plaintiff was injured by reason of the collision; that there were cars parked on the right of Adams Street; that Adams Street is paved with a twenty foot concrete slab in the center, and thirteen feet of brick on each side of the pavement; that the regular traffic lane of the bus was on the concrete; that each time it stopped, prior to the collision, it drove the right wheels of the bus off of the concrete; that at the time of the collision in question, there were lights inside the bus; that the headlights were burning, and that there were red lights at

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the rear of the bus, and a large stop light that turned red, and said, "Stop," when the motorman of the bus would put on his brake preparatory to stopping the bus. The above facts are not in dispute. Practically the only disputed question in this record is, where the bus stopped, at the time of the collision.

It is insisted by the plaintiff and her witnesses that in all prior stops the bus pulled partly off of the concrete slab, and stopped before it came to the intersection, but this time the bus passed the intersection of Homestead Avenue before it stopped, and did not turn to the right before stopping, but at the time the bus stopped, the left wheels were on, or very close to the black line in the center of Adams Street; that as the driver of the car attempted to pass the bus, he saw he could not do so, and turned to the right and before he could stop his car, he collided with the bus. Mrs. Jones, her husband and Mr. Bush all testified to these facts.

Mr. Louis Davis, Jr., a Police Officer, testified that he saw the bus after the accident, and that the left wheels of the bus were near the black line, but he was not interrogated as to whether it was in, or south of the intersection.

It is not disputed that the bus was well lighted, or that the rear lights on the bus were burning, or that the six inch stop light on the back of the bus was in good working order, or that the

the rear of the bus, and a large stop light turned red, and said, "stop," when the motorist of the bus would not stop. The motorist refused to stop. The above facts are not in dispute. Presumably the only disputed question in this accident, where the bus stopped at the time of the collision.

It is insisted by the plaintiff and her witnesses that in all prior stops the bus pulled partly off of the concrete strip, and stopped before it came to the intersection, but when this time the bus passed the intersection of Homestead Avenue before it stopped, and did not turn to the right before stopping, and at the time the bus stopped, the left wheels were on, or very close to the black line in the center of Adams Street; that as the driver of the car attempted to pass the bus, he saw he could not do so, he turned to the right and before he could stop his car, he collided with the bus. Mrs. Jones, her husband and Mr. Bush all testified to these facts.

Mr. Louis Davis, Jr., a Police Officer, testified that he saw the bus after the accident, and that the left wheels of the bus were near the black line, but he was not interrogated as to whether it was in, or south of the intersection. It is not disputed that the bus was well lighted, or that the rear lights on the bus were burning, or that the six inch stop light on the back of the bus was in good working order, or that the

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driver, in stopping the bus, put his foot on the brake, which would light the stop light. The bus was inspected before and after the accident, and all of the lights were found to be in proper working order.

Mr. Homer Land, the driver of the bus, was called as a witness, and testified that in making this stop, he did exactly the same as he had in the five or six previous stops; that he pulled the bus about half way off of the cement, applied his foot brake to which the stop light was attached, and came to a gradual stop; that when the bus stopped, the front end was about four feet south of Homestead Avenue; that no part of the bus had entered the intersection at the time of the collision.

Mr. L. J. Beale, claim agent of the defendant, said that he was notified of the accident and arrived there about 8:40 p.m; that he noticed glass on the pavement which, in his opinion, was at least ten good steps south of the intersection of Adams and Homestead Avenue.

Mr. Irvin Fisher, a workman at the Caterpillar Tractor Company, said that he was operating a filling station at the northeast corner of Adams and Homestead Avenue on Easter Sunday in 1939; that he recalled the accident; that he and his wife were together at the filling station. They heard the crash and went over to the scene of the accident. The bus was lighted and had stopped at the regular

driver, in stopping the bus, but as foot on the brake, which would light the stop light. The bus was expected before and after the accident, and all of the lights were found to be in proper working order.

Mr. Homer Lang, the driver of the bus, was called as a witness, and testified that in making this stop, he did exactly the same as he had in the five or six previous stops; that he pulled the bus about half way off of the cement, applied the foot brake to which the stop light was attached, and came to a gradual stop; that when the bus stopped, the front end was about four feet south of Homestead Avenue; that no part of the bus had entered the intersection at the time of the collision.

Mr. L. J. Leslie, claim agent of the defendant, said that he was notified of the accident and arrived there about 8:45 p.m.; that he noticed glass on the pavement at the intersection, was at least ten good steps south of the intersection of Adams and Homestead Avenue.

Mr. Edwin Barker, a workman at the Lillington Trust Company, said that he was operating a filling station at the northeast corner of Adams and Homestead Avenue on Easter Sunday in 1937; that he recalled the accident; that he and his wife were together at the filling station. They heard the crash and went over to the scene of the accident. The bus was lighted and had stopped at the regular



stopping point for the bus. The front end of it was south of the intersection, and no part of the bus was in the intersection. It was about half way off of the concrete onto the brick.

Mr. Raymond Furniss testified that he was a passenger on the bus on the evening of the accident; that the speed of the bus was between fifteen and twenty miles an hour; that as the bus stopped at Homestead Avenue, it was hit from the rear by a passenger car; that he got off of the bus and observed the back end of it. The lights were all burning, which included two tail lights. There were also two reflectors below the lights; that so far as he could see, the stop the bus made was like the ordinary stops that it always makes; that no part of the bus was in the intersection of Homestead Avenue, and the right side of the bus was on the brick part of the pavement.

Mrs. Esther Fisher testified that she was at the filling station with her husband. They heard the noise and crash of the accident, and went over to it and noticed where the bus was located in the street. It was on the south side of the intersection and was on the right-hand side of the center of the concrete slab.

Mrs. Viola Whitehead testified that she lived on Adams Street within a block of the accident on Easter Sunday in 1939; that she heard the crash and went up to the scene of the accident; that the bus was stopped before it got into the intersection of Homestead Avenue; that the bus was over the brick part of the pavement more than it was on the concrete slab.

stopping point for the bus. The front end of it was south of the intersection, and no part of the bus was in the intersection. It was about half way off the concrete onto the sidewalk.

Mr. Raymond Thomas testified that there was a passenger

on the bus on the evening of the accident; that the speed of the bus was between fifteen and twenty miles an hour; that as the bus stopped at Homestead Avenue, it was 15 feet from the rear of a passenger car; that he got off of the bus and observed the back end of it. The lights were

all burning, which included two tail lights. There were also two reflectors below the lights; that so far as he could see, the stop the bus made was like the ordinary stop that it always makes; that no part of the bus was in the intersection of Homestead Avenue, and the right side of the bus was on the brick part of the pavement.

Mrs. Esther Fisher testified that she was at the Milling

station with her husband. They heard the noise and crash of the accident, and went over to it and noticed where the bus was located in the street. It was on the south side of the intersection and

was on the right-hand side of the corner of the intersection.

Mrs. Viola Whitehead testified that she lived on Adams Street

within a block of the accident on Weston Sunday in 1939; that she heard the crash and went up to the scene of the accident; that the bus was stopped before it got into the intersection of Homestead Avenue; that the bus was over the brick part of the pavement; that it was on the

concrete sidewalk.

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Mrs. Lois Salter testified that in April 1939, she lived at 207 Homestead Avenue which is about a block and a half from the intersection of Homestead and north Adams Street; that she heard a crash and ran out; that she noticed two stop lights on the rear of the bus and there were lights inside; that the bus had stopped about two feet to the right of the black line in the concrete slab, and was about two feet back of the crossing.

Mrs. Ethel Hanchett testified that at the time of the accident, she lived on the corner at the scene of the accident; that she was attracted by the noise of the collision, and went out to observe the bus and car; that the bus had stopped with the front end south of the street intersection, and that no part of the bus was within the intersection.

Mrs. Lydia Eskew testified that she lived on a corner lot next to the scene of the accident, but that her home was on the back of the lot; that they heard the crash and went up to the scene of the accident; that the bus was south of the intersection and to the right side of the black line.

In rebuttal Mr. Fred W. Tuerk was called and testified that he went to the scene of the accident and saw glass on the pavement 20 to 25 feet from the middle of the intersection of Homestead and Adams Street, and that the bus had stopped beyond the line of the crossing.

Mrs. Lola Salter testified that in April 1930, she lived at 207 Homestead Avenue which is about a block and a half from the intersection of Homestead and North Adams Street; that she heard a crash and ran out; that she noticed two stop lights on the rear of the bus and there were all right; that the bus had stopped about two feet to the right of the black line in the concrete sidewalk and was about two feet back of the crosswalk.

Mrs. Ethel Hanchett testified that at the time of the accident, she lived on the corner at the scene of the accident; that she was attracted by the noise of the collision, and went out to observe the bus and car; that the bus had stopped with the front end south of the street intersection, and that no part of the bus was within the intersection.

Mrs. Lydia Baker testified that she lived on a corner lot next to the scene of the accident, but that her house was on the back of the lot; that they heard the crash and went up to the scene of the accident; that the bus was south of the intersection and to the right side of the black line.

In rebuttal Mr. Fred W. Trever was called and testified that he went to the scene of the accident and saw, from the pavement 20 to 25 feet from the middle of the intersection of Homestead and Adams Street, and that the bus had stopped beyond the line of the crossing.

From a review of this evidence, it is our conclusion that the plaintiff wholly failed to establish that the accident occurred by reason of the bus having stopped after it crossed the curb line of the intersection of Homestead Avenue. It seems to us that credible evidence establishes the fact that after the bus stopped, it was on the south side of Homestead Avenue.

The plaintiff charged in her complaint that the defendant violated Section 188 of Chapter 95<sup>1</sup>/<sub>2</sub> of the Revised Statutes of the State of Illinois, and that by reason of such violation she was injured. The Section of the Statute is as follows: "Parking at right-hand curb. Paragraph 91. On Streets forming a part of the State Highway System, angle parking may be permitted by local ordinance on that portion of the street not under the jurisdiction and control of the State. Where angle parking is not so permitted, every vehicle stopped or parked upon a roadway where there is an adjacent curb shall be so stopped or parked with the right-hand wheels of such vehicle parallel with and within 12 inches of the right-hand curb."

The Fifth Paragraph of Count 3 of the amended complaint charges that the 3400 Block of North Adams Street was, and is a part of a street forming a part of the State Highway System, and at the place of the accident angle parking was not permitted by any Ordinance of the City of Peoria, Illinois, and there was an adjacent

From a review of this evidence, it is our conclusion that

the plaintiff wholly failed to establish that the accident occurred by reason of the bus having stopped after it crossed the curb line at the intersection of Homestead Avenue. It seems to us that credible evidence establishes the fact that after the bus stopped, it was on the south side of Homestead Avenue.

The plaintiff charged in her complaint that the defendant

violated Section 138 of Chapter 38 of the Revised Statutes of the State of Illinois, and that by reason of such violation she was injured. The Section of the Statute is as follows: "Section 138. It shall be unlawful for any person to park a vehicle on a street or highway so as to obstruct the free passage of traffic. On streets forming a part of the State Highway System, angle parking may be permitted by local ordinance on that portion of the street not under the jurisdiction and control of the State. Where angle parking is not so permitted, every vehicle stopped or parked upon a roadway where there is an adjacent curb shall be so stopped or parked with the right-hand wheels of such vehicle parallel with and within 12 inches of the right-hand curb."

The Fifth Paragraph of Count 3 of the amended complaint charges that the 3400 Block of North Adams Street was, and is a part of a street forming a part of the State Highway System, and at the place of the accident angle parking was not permitted by any Ordinance of the City of Peoria, Illinois, and there was an adjacent

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curb. The defendant, in its answer, denies all of the allegations of these two paragraphs.

A careful reading of the abstract does not disclose where there is any evidence that there was any curb on Adams Street near the place where the accident occurred. It will be observed that the statute applies only to streets that form a part of the State Highway System and "where there is an adjacent curb," and where by local ordinances angle parking is not permitted.

The appellee insists that the Court should take judicial knowledge of all of the Ordinances of the City of Peoria, and decide whether there is, or is not an ordinance allowing angle parking on Adams Street near the place of the collision in question. Section 48 of Chapter 151, of our Statutes so provides, and if it had been a question of law presented to the Court for his decision, no doubt he would take judicial knowledge of the Ordinances of the City of Peoria. In the present case, the complaint alleges that the defendant violated a State Statute which necessarily involves the question whether there is, or is not an ordinance governing the parking on Adams Street near the place of the collision. It is a question of fact for the jury to decide whether the defendant had violated such a statute. The plaintiff should either have shown there was, or was not such an ordinance, or asked the Court to instruct the jury relative to what the ordinances

culp. The defendant, in the answer, denies all of the allegations of these two paragraphs.

A counsel appearing in this street case of disclosure where there is any evidence that there was any kind of Adams Street near the place where the accident occurred. It will be observed that the statute applies only to streets that form a part of the State Highway System and "where there is an adjacent street," and where a local ordinance makes single parking is not permitted.

The appellee insists that the Court should have judicial knowledge of all of the Ordinances of the City of Peoria, and decide whether there is, or is not an ordinance prohibiting or is parking on Adams Street near the place of the collision in question. Section 48 of Chapter 131, of our Statutes is provided, and it has been a question of law presented to the Court for its decision, no doubt he would take judicial knowledge of the Ordinances of the City of Peoria. In the present case, the complainant alleges that the defendant violated a State Statute which necessarily involves the question whether there is, or is not an ordinance governing the parking on Adams Street near the place of the collision. It is a question of fact for the jury to decide whether the defendant has violated such a statute. The plaintiff should either have shown there was, or was not such an ordinance, or asked the Court to instruct the jury relative to what the ordinances



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were, relative to such parking. This, the plaintiff did not do, and there was nothing presented to the jury for their decision, as to whether the defendant had violated the statute by not driving close to the curb when it stopped its bus. It is our conclusion that because the plaintiff failed to establish the fact, that there was an adjacent curb on the south side of the street near where the bus stopped, and also whether there was any ordinance governing parking on the south side of Adams Street at the place where the accident occurred, she cannot recover upon the third count of her complaint.

Complaint is made by the defendant that the Court erred in not giving the defendant's fifth refused instruction. We think that the jury were fairly well instructed on behalf of the defendant, and this refused instruction was covered by other given instructions. The judgment will be reversed and remanded.

Reversed and Remanded.



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Gen. No. 9746.

Agenda No. 7.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT.  
FEBRUARY TERM, A. D. 1942.

FRANK J. WISE,  
Complainant and Appellant,  
vs.  
MARY B. HAYDEN,  
Defendant and Appellee.

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Appeal from the  
County Court of  
Will County, Illinois.

WOLFE,-- J.

Frank J. Wise, an Attorney at Law, in Will County, Illinois, started suit against the defendant, Mary B. Hayden, for an attorney's fee of \$175.00, which he claimed was due him from the defendant for professional services rendered to her. The complaint alleges that the defendant employed the attorney to represent her in settlement of certain real estate mortgage notes held and owned by her; that pursuant to said employment, he rendered valuable and extended services therein, and enabled the defendant to receive payment in full on the principal

3141A.205

Alameda No. 7.

Gen. No. 9443.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT.  
FEBRUARY TERM, A. D. 1912.

Appeal from the  
County Court of  
Will County, Illinois.

FRANK J. WISE,  
Complainant and Appellant,

vs.

MARY B. HAYDEN,  
Defendant and Appellee.

WOLFE,-- 1.

Frank J. Wise, an Attorney at Law, in Will County, Illinois, started suit against the defendant, Mary B. Hayden, for an attorney's fee of \$150.00, which he claimed was due him from the defendant for professional services rendered to her. The complaint alleges that the defendant employed the attorney to represent her in settlement of certain real estate mortgage notes held and owned by her; that payment to said employment, he rendered valuable and extended services therein, and enabled the defendant to receive payment in full on the principal

2.

of said mortgage notes; that upon the completion of the services, the defendant agreed to pay the plaintiff the sum of \$175.00, but now wholly fails and refuses to pay said sum.

The defendant filed her answer in which she admitted the plaintiff was an attorney, but denied each and every other allegation of the plaintiff's complaint. The case was tried before the Court without a jury and at the conclusion of the evidence, judgment was rendered in favor of the defendant. It is from this judgment that the appeal is prosecuted.

The plaintiff introduced evidence to sustain his contention and the defendant introduced evidence to sustain her answer. The trial court, after hearing the evidence of both parties, found that the plaintiff had not proven his case by a preponderance of the evidence. We have read the evidence, as contained in the record, and abstract, and we cannot say that the trial court's finding is against the manifest weight of the evidence.

The Judgment of the Trial Court is affirmed.

Affirmed.

of said mortgage notes; that upon the completion of the services, the defendant agreed to pay the plaintiff the sum of \$175.00, but now wholly fails and refuses to pay said sum.

The defendant filed her answer in which she admitted the plaintiff was an attorney, but denied said and every other allegation of the plaintiff's complaint. The case was tried before the Court without a jury and at the conclusion of the evidence, judgment was rendered in favor of the defendant. It is from this judgment that the appeal is prosecuted.

The plaintiff introduced evidence to sustain his contention and the defendant introduced evidence to sustain her answer. The trial court, after hearing the evidence of both parties, found that the plaintiff had not proven his case by a preponderance of the evidence. We have read the evidence, as contained in the record, and abstract, and we cannot say that the trial court's finding is against the manifest weight of the evidence.

The judgment of the Trial Court is affirmed.

Witness my hand and seal of office this 10th day of June, 1910.

OK.  
32, 2.

314 I.A. 205<sup>2</sup>

Gen. No. 9750.

Agenda No. 10.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT.  
FEBRUARY TERM, A. D. 1942.

823  
156

SMITH P. GIDDINGS,  
Plaintiff-Appellant,  
vs.  
MRS. DORA SENNEFF,  
Defendant-Appellee.

Appeal from the  
Circuit Court of  
Carroll County.

WOLFE,-- J.

Smith P. Giddings took a judgment by confession against Mrs. Dora Senneff in vacation before the Circuit Clerk of Carroll County on January 11, 1941. The note was dated November 7, 1939, the amount of which was \$900.00. Judgment was taken including interest, costs and attorney's fees in the sum of \$1,045.55. Mrs. Dora Senneff filed an affidavit in the Circuit Court asking that the judgment be set aside, or vacated and for leave to plead. This motion was granted and the judgment opened up, and the defendant

76.80

81-1-1002

WITNESSES

Gen. No. 3730

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
FEBRUARY TERM, A. D. 1932.

Appellant  
Illinois Court of  
Second District

SMITH P. GIDDINGS,  
Plaintiff-Appellant,  
vs.  
MRS. DORA SEMMEL,  
Defendant-Appellee.

WOLFE, -- 2.

Smith P. Giddings took a judgment of possession against Mrs. Dora Semmel in vacation before the Circuit Court of Carroll County on January 11, 1929. The note was dated November 1, 1928, the amount of which was \$900.00. Judgment was taken including interest, costs and attorney's fees in the sum of \$1,048.90. Mrs. Dora Semmel filed an affidavit in the Circuit Court asking that the judgment be set aside, on vacation and for leave to plead. This motion was granted and the judgment opened up, and the defendant



2.

was also granted leave to file an answer. The answer was filed. The case then was tried before the Court without a jury, and the judgment vacated and set aside. Judgment was entered against the plaintiff for costs. It is from this judgment that an appeal is prosecuted to this Court.

The evidence shows that Mrs. Senneff had no dealings whatsoever, with the plaintiff, Giddings, but all of the transactions that Mrs. Senneff had, relative to this note, were carried on by one, Louis Tobias, who was an agent for some Mississippi land that Mrs. Senneff had purchased in that State. Mrs. Senneff's testimony is that she did not know that she was signing a note, but that Mr. Tobias told her that it was a release of some kind necessary to be filed in connection with the land that she had purchased in the State of Mississippi. She also testified that she had no dealings whatsoever, with Mr. Giddings, and that she never received any money, or any other valuable thing in consideration for signing the note. There is no proof whatsoever, that she did receive any valuable consideration for the note.

Mr. Giddings, the plaintiff, testified that he had had conversations with Tobias relative to taking a note from Mrs. Senneff, providing Tobias would procure such a note. He testified that Tobias did bring the note, signed by Mrs. Senneff, to him, and that he gave Tobias \$900.00 in exchange for the note.

was also granted leave to file an answer. The answer was filed. The case then was tried before the Court without a jury, and the judgment vacated and set aside. Judgment was entered against the plaintiff for costs. It is from this judgment that an appeal is prosecuted to this Court.

The evidence shows that Mrs. Bennett had no dealings whatsoever with the plaintiff, Giddings, but all of the transactions that Mrs. Bennett had, relative to this note, were carried on by one, Louis Tobias, who was an agent for some Mississippi land that Mrs. Bennett had purchased in that State. Mrs. Bennett's testimony is that she did not know that she was signing a note, but that Mr. Tobias told her that it was a release of some kind necessary to be filed in connection with the land that she had purchased in the State of Mississippi. She also testified that she had no dealings whatsoever with Mr. Giddings, and that she never received any money, or any other valuable thing in consideration for signing the note. There is no proof whatsoever, that she did receive any valuable consideration for the note.

Mr. Giddings, the plaintiff, testified that he had had conversations with Tobias relative to taking a note from Mrs. Bennett, providing Tobias would procure such a note. He testified that Tobias did bring the note, signed by Mrs. Bennett, to him, and that he gave Tobias \$300.00 in exchange for the note.

3.

It is first insisted by the appellant that the Court erred in opening the judgment on the motion of the plaintiff, because the affidavit in support thereof, signed by Mrs. Senneff, did not set forth a valid defense in compliance with the Statute. No doubt, there are numerous matters in the affidavit which are stated on information and belief that state conclusions rather than facts, but the affidavit does state positively that there was no consideration for the note, which would be a valid defense; also the affidavit states facts, if true, that there was fraud in the procurement of the note. We find no merit in appellant's contention that the Court erred in opening the judgment on account of the insufficiency of the affidavit of the defendant.

From a review of the evidence, it seems to us that the Court must have found that in this transaction in the procurement of the note, and the delivery of the money, that Tobias was acting as the agent of Smith P. Giddings, instead of the appellee, Mrs. Senneff. The proof is positive that Mrs. Senneff did not receive any money whatsoever for this note. While Mrs. Senneff's testimony shows that she is of advanced age, and was much confused in regard to a great many details, it can be gathered from the whole of the evidence that she did not know that she was signing a promissory note, but thought that she was signing a release of some kind. On either one of these issues we think the Court would have been justified in finding in favor of the defendant.

We find no reversible error in the case, and the judgment of the Trial Court is affirmed.

Affirmed.

It is first insisted by the appellant that the Court erred in opening the judgment on the motion of the plaintiff, because the affidavit in support thereof, signed by Mrs. Sennell, did not set forth a valid defense in compliance with the statute. No doubt, there are numerous matters in the affidavit which are stated on information and belief that state conclusions rather than facts, but the affidavit does state positively that there was no negotiation for the note, which would be a valid defense; also the affidavit states facts, if true, that there was fraud in the procurement of the note. We find no merit in appellant's contention that the Court erred in opening the judgment on account of the insufficiency of the affidavit of the defendant.

From a review of the evidence, it seems to us that the Court must have found that in this transaction in the procurement of the note, and the delivery of the money, that Fobles was acting as the agent of Smith P. Gibbons, instead of the appellee, Mrs. Sennell. The proof is positive that Mrs. Sennell did not receive any money whatsoever for this note. While Mrs. Sennell's testimony shows that she is of advanced age, and was much confused in regard to a great many details, it can be gathered from the whole of the evidence that she did not know that she was signing a promissory note, but thought that she was signing a release of some kind. On either one of these issues we think the Court would have been justified in finding in favor of the defendant.

We find no reversible error in the case, and the judgment of the Trial Court is affirmed.

OK 25.

314 I.A. 206

Gen. No. 9754.

Agenda No. 13.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
FEBRUARY TERM, A. D. 1942.

833  
156

RUTH PEPPER,  
Appellee,  
vs.  
FAITH ARMSTRONG, et al.,  
Faith Armstrong,  
Appellant.

Appeal from  
Circuit Court,  
Winnebago  
County.

WOLFE,-- J.

This is a suit in equity wherein the plaintiff, Ruth Pepper, as the legal owner and holder of a certain promissory note secured by a trust deed on real estate in Winnebago County, Illinois, asks to fore-close such trust deed. The parties defendant to said suit are, John G. Foster and Ethel Foster, his wife, makers of the note secured by the trust deed, and Luke Wendell and Phyllis Wendell, husband and wife, contract purchasers for the property. All of the above named persons were the grantors in said deed of trust wherein, David D. Madden was appointed trustee in said instrument, with others as successor trustees.

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3141A.206

Volume No. 13.

Gen. No. 9754.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
FEBRUARY TERM, A. D. 1942.

Appeal from  
Circuit Court,  
Winnebago  
County.

RUTH PEPPER,  
Appellee,  
vs.  
FALITH ARMSTRONG, et al.,  
Appellant.

WOLFE,-- J.

This is a suit in equity wherein the plaintiff, Ruth Pepper, as the legal owner and holder of a certain promissory note secured by a trust deed on real estate in Winnebago County, Illinois, asks to fore- close such trust deed. The parties defendant to said suit are, John G. Foster and Ethel Foster, his wife, makers of the note secured by the trust deed, and Luke Wendell and Phyllis Wendell, husband and wife, contract purchasers for the property. All of the above named persons were the grantors in said deed of trust wherein, David D. Madden was appointed trustee in said instrument, with others as successor trustees.

2.

Homer Ives was also made a party defendant as the owner and holder of another note secured by a deed of trust on said premises, but his note has been paid, so is not now a party to the litigation. The defendant, Faith Armstrong, is the record title holder of the premises sought to be foreclosed upon, and is the assignee of articles of agreement for warranty deed under which Luke Wendell and wife are purchasing the premises. The other parties defendant are not interested in the appeal, as any interest that they might have had was on a different deed of trust.

The complaint, as amended, is in the usual form stating the makers of the note, and the property covered by the trust agreement. It is alleged that the plaintiff is the legal holder and owner of a note of \$1,000.00 with interest at seven per cent payable semi-annually; that default has been made in the payment of said note, and she asks for foreclosure of the trust deed.

The defendant, Faith Armstrong, filed a separate answer in which she admitted the making, execution and delivery of the promissory note in question, and also the execution of the trust deed given to secure the payment of said note. She denied that no part of the principal of said note was paid, and alleged that all, or nearly all of the principal on the note had been paid. She further alleged that Luke Wendell and Phyllis Wendell had paid on their contract of purchase, practically all that was due on the same, to David D. Madden, who was

Homer Ives was also made a party defendant as the owner and holder of another note secured by a deed of trust on said premises, but his note has been paid, so is not now a party to the litigation. The defendant, Faith Armstrong, is the record title holder of the premises sought to be foreclosed upon, and is the assignee of evidence of assignment for warranty deed under which Luke Wendell and wife are purchasing the premises. The other parties defendant are not interested in the appeal, as any interest that they might have had was on a different deed of trust.

The complaint, as amended, is in the usual form stating the makers of the note, and the property covered by the trust agreement. It is alleged that the plaintiff is the legal holder and owner of a note of \$1,000.00 with interest at seven per cent payable semi-annually; that default has been made in the payment of said note, and she asks for foreclosure of the trust deed.

The defendant, Faith Armstrong, filed a separate answer in which she admitted the making, execution and delivery of the promissory note in question, and also the execution of the trust deed given to secure the payment of said note. She denied that on part of the principal of said note was paid, and alleged that all, or nearly all of the principal on the note had been paid. She further alleged that Luke Wendell and Phyllis Wendell had paid on their contract of purchase, practically all that was due on the same, to David D. Madden, who was



3.

the agent and attorney for Ruth Pepper; that Madden had paid to Ruth Pepper the interest on her note, but had not paid the principal, as collected by him, from the Wendells. She made a tender to the attorney for Ruth Pepper of the amount which she estimated was the balance due on the note, after deducting the amounts paid by the Wendells to Madden, that had not been credited on the principal of the note.

Faith Armstrong denied that the plaintiff had a prior lien upon the premises for any amount above that which had been tendered by her to the plaintiff. She also filed a counter claim and asked for an injunction to restrain Ruth Pepper from enforcing a lien for a greater amount than she had tendered to her, as being the balance due on the note in question. In the counter claim it is also alleged that David D. Madden, the Trustee mentioned in the deed of trust, was acting as agent and attorney for Ruth Pepper, and that said Madden notified Francis S. Keye, agent for Faith Armstrong, who had been collecting the payments on the contract of purchase from Luke Wendell and Phyllis Wendell, that said trust deed and note were in default, and that the owner and holder thereof, had demanded possession of said premises, until said indebtedness, interest and principal was satisfied, and paid in full, and that the said David D. Madden, trustee, agent and attorney for Ruth Pepper, notified Luke Wendell and Phyllis Wendell, that said trust deed and note were in default, and that Ruth Pepper demanded possession of said premises, and that the payments on said

the agent and attorney for Ruth Pepper; that Madgen had paid to Ruth Pepper the interest on her note, but had not paid the principal, as collected by him, from the Wendells. She made a tender to the attorney for Ruth Pepper of the amount which she estimated was the balance due on the note, after deducting the amounts paid by the Wendells to Madgen, that had not been credited on the principal of the note. Faith Armstrong denied that the plaintiff had a prior lien upon the premises for any amount above that which had been tendered by her to the plaintiff. She also filed a counter claim and asked for an injunction to restrain Ruth Pepper from enforcing a lien for a greater amount than she had tendered to her, as being the balance due on the note in question. In the counter claim it is also alleged that David D. Madgen, the Trustee mentioned in the deed of trust, was acting as agent and attorney for Ruth Pepper, and that said Madgen notified Francis S. Key, agent for Faith Armstrong, who had been collecting the payments on the contract of purchase from Luke Wendell and Phyllis Wendell, that said trust deed and note were in default, and that the owner and holder thereof, had demanded possession of said premises, until said indebtedness, interest and principal was satisfied, and paid in full, and that the said David D. Madgen, trustee, agent and attorney for Ruth Pepper, notified Luke Wendell and Phyllis Wendell, that said trust deed and note were in default, and that Ruth Pepper demanded possession of said premises, and that the payments on said

4.

contract must be made to him on behalf of Ruth Pepper; that Madden as trustee and as agent and attorney for Ruth Pepper, did enter in possession of the premises and retained the same until the time of his death, and that he collected on said contract, the sum of \$1,093.00 and paid to Ruth Pepper the sum of \$409.00.

The plaintiff filed a reply to the answer of Faith Armstrong and an answer to the counter claim, and admitted most of the allegations of the answer and counter claim, but expressly denied that David D. Madden was her agent and attorney when he collected anything upon the contract of purchase of the Wendells.

The case was tried before the Court without a jury, who found the plaintiff was entitled to foreclose her deed of trust, and found the amount due, together with costs and reasonable attorney fees, and entered the decree accordingly. It is from this decree that Faith Armstrong prosecutes this appeal.

The note and trust deed in question was dated May 1, 1925. Shortly thereafter Ruth Pepper purchased from David D. Madden the note in question, for \$1,000.00, which was the face value of the note. David D. Madden was the trustee named in said deed of trust, and he delivered to her, the note, the trust deed and abstract to the premises. The interest was paid regularly for some time on the note until along in the fall of 1934, there was some interest due and unpaid. Ruth Pepper

contract was to make a loan of \$100,000 to the plaintiff as trustee and as agent for the plaintiff, the plaintiff's possession of the contract was to be for the plaintiff's use and benefit, and that the plaintiff was to pay the sum of \$1,000.00 and make a loan of \$100,000.00 to the plaintiff.

The plaintiff then made a loan of \$100,000.00 to the plaintiff and an answer to the plaintiff's complaint was filed. The plaintiff then made a loan of \$100,000.00 to the plaintiff and an answer to the plaintiff's complaint was filed. The plaintiff then made a loan of \$100,000.00 to the plaintiff and an answer to the plaintiff's complaint was filed. The plaintiff then made a loan of \$100,000.00 to the plaintiff and an answer to the plaintiff's complaint was filed.

The case was tried before the court and the plaintiff won. The plaintiff then made a loan of \$100,000.00 to the plaintiff and an answer to the plaintiff's complaint was filed. The plaintiff then made a loan of \$100,000.00 to the plaintiff and an answer to the plaintiff's complaint was filed. The plaintiff then made a loan of \$100,000.00 to the plaintiff and an answer to the plaintiff's complaint was filed.

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took the note and trust deed to David D. Madden's office and had a conversation with him relative to the note and the back interest. The note bears seven per cent interest, and it was agreed between Mr. Madden and Ruth Pepper that it would be better not to try to collect the note, on account of the large interest rate, but just collect the interest and let the note stand as it was. She left the note and trust deed with Mr. Madden, and he collected the interest and remitted to her regularly from that time up until the time of his death. Ruth Pepper testified positively that the note was simply there for him to collect the interest, and past due interest. She said that he collected and paid her the back interest at the rate of \$10.00 per month until all of the delinquent interest was paid. The principal and interest on the note were payable at the office of David D. Madden. So far as the record discloses Ruth Pepper had no knowledge that the contract of purchase between the Wendells and Faith Armstrong was in the possession of David D. Madden, or that he had anything to do with such contract, nor did she have any notice whatsoever, that the Wendells were in possession of said real estate under contract for deed. How the contract for a deed came into the possession of Madden, is not disclosed by the evidence in this case.

In the counter claim of the appellant, it is alleged that David D. Madden, as the agent and attorney for Ruth Pepper, demanded of the Wendells the possession of the premises in question, and

took the note and first used it to pay the note and then  
conversations with him relative to the case and the note.  
The note bears date of 1st January, and is for \$1000.  
Mr. Madden and Mrs. Madden first collected the note, or  
collect the note, or account of the note, or account of the  
collect the interest and first used it to pay the note and  
note and first used it to pay the note, or account of the  
and notified to her personally, from that time forward, and  
his death. With regard to the note, or account of the  
there for him to collect the note, or account of the  
said that he collected the note and first used it to pay the  
\$10.00 per month until all of the balance of the note was paid.  
principal and interest on the note were paid at the time of the  
D. Madden. As far as the note is concerned, and as far as the  
that the contract of purchase between the parties was for the  
was in the possession of David D. Madden, or that he was  
do with such contract, and that she had no interest in the  
the Wendells were in possession of the note and could not  
dead. How the contract for a deed was made, or account of the  
is not disclosed by the evidence in this case.  
The contract claim of the Wendells, as it is alleged  
that David D. Madden, as the agent and attorney for the Wendells, was  
manded of the Wendells the possession of the note in question, and

6.

actually took possession of the same for Ruth Pepper; that David D. Madden wrote a letter to Luke Wendell to this effect. This contention of the appellant is not sustained by the evidence. Luke Wendell did testify that David D. Madden wrote him a letter and after that, he made his payments on the contract of purchase to Mr. Madden. An examination of the record discloses that Luke Wendell was called as an adverse witness by Faith Armstrong and that the attorney for Ruth Pepper challenged her right to call him as such witness. The Court permitted him to testify over the objection of the plaintiff, because there was a controversy between the defendants themselves, and in order to properly adjudicate the rights of the defendants, this testimony was admitted, but the Court held that such testimony would not be binding upon the plaintiff.

The controversy appears to be one of fact only, that is, whether at the time David D. Madden collected the payments from the Wendells on the contract of purchase of the premises, he was acting as the agent of Ruth Pepper, or the agent of the owner of the contract of purchase. This was a question of fact squarely submitted to the trial court for his determination. The defendant, by her answer and counter claim, charged that Madden was the agent of Ruth Pepper and by the reply and answer to the counter claim, Ruth Pepper denied that he was her agent or attorney for such purpose. The trial court evidently held that David D. Madden was not the agent and attorney

actually took possession of the car on the 10th of March, 1934.

D. Madden whose name is later mentioned in the evidence, was the

testimony of the complainant in the case of the evidence.

Wendell told testifies that on the 10th of March, 1934, he

after that, he was in the car and he was in the car.

Madden. An examination of the record indicates that the

called as an adverse witness by the State was the

for Ruth Popper of Madison, Wisconsin, who was

The Court permitted the testimony of the witness to be

because there was a controversy between the State and

and in order to properly establish the facts of the case,

testimony was admitted, and the Court found that the

not be given upon the evidence.

The controversy appears to be a matter of fact, and

whether at the time that D. Madden called the witness to

Wendell on the contract of purchase of the car, and

as the agent of Ruth Popper, of the record of the

of purchase. This was a question of fact, and the

trial court for the record. The evidence in the

counter claim, charged that Madden was the agent of

by the reply and answer to the counter claim, and the

he was for a part of the testimony for a part of the

evidently not with D. Madden was the agent of



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for Ruth Pepper in the collections of these amounts on said contract. In the decree in his finding of facts, the Court found that the plaintiff has established her complaint as alleged. This is equivalent to a finding of fact, that David D. Madden was not her attorney in such collection.

The Court also adjudicated rights among other defendants, which has no bearing upon the controversy in question, so we have not attempted to discuss the equities among the other parties.

We find no reversible error in the case, and the decree appealed from is hereby affirmed.

Affirmed.

For this paper in the collection of 1907-1908, the collection is

In the course of his finding of facts, the court has

plaintiff has established the defendant as a person who

to a finding of fact, that said defendant is a person who

and collection.

The Court also rejected the defendant's contention

which has no bearing upon the controversy in issue, and the court

attempted to discuss the defendant's contention.

No finding of fact was made by the court, and the

appealed from its finding of fact.

11-11-11

Abstract

General number 9296.

Agenda number 4.

IN THE APPELLATE COURT

OF ILLINOIS

THIRD DISTRICT

FEBRUARY TERM, A. D. 1942

BYRON M. DOSSETT, Adminis-  
trator of the Estate of  
DALE DOSSETT, Deceased,

Plaintiff-Appellee,

-vs-

ROBERT ANDERSON,

... Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT  
OF TAZEWELL COUNTY.

314 I.A. 886<sup>1</sup>

HONORABLE JOSEPH E. DAILY,

Judge Presiding.

HAYES, P. J. :

An action was brought by the father of Dale Dossett, as Administrator, for his wrongful death in an automobile accident, against Robert Anderson, the defendant, who was the driver of the car in which the deceased was a passenger. The defendant was charged with willful and wanton misconduct in the operation of the automobile. The defendant was sixteen years of age at the time of the accident, and the deceased was thirteen. The death occurred on September 14, 1937 at about nine - ten o'clock on state route 122 (which ran east and west.) This road was the usual eighteen foot slab with a black line in the center. At the place of the accident the road was straight and level.

Shortly before the accident, the defendant met the deceased Dale Dossett, Glen Rhoades, his brother Velde Rhoades and Bob Hitt on a street corner in the village of Hopedale, and invited them for a ride. The four boys

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*[The page contains faint, illegible markings and bleed-through from the reverse side.]*

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Hopewell, and invited them for a ride. The four boys  
 Thaddeus and Bob left on a street corner in the village of  
 the deceased Dale Bennett, when Thaddeus, in a friendly voice  
 quickly turned to Bennett, to ascertain the

accepted the invitation and got into the car. The deceased sat in the front seat with the driver and the other three boys in the rear seat. After riding out on the hard road a few miles they started back towards Hopedale. It was dark at the time, and was drizzling rain, which it had been doing for some time. The shoulder of the hard road was soft; the visibility on account of the atmospheric condition was poor, and the pavement was wet.

The accident happened about one and a quarter miles west of Hopedale, on the south side of the concrete. At this point, and some distance west of it, there is a dirt shoulder from six to eight feet wide. South of this shoulder is a ditch about two feet deep with sides that slope gradually. Across this ditch is a culvert over which runs a south bound private driveway that leads into a farm house. This culvert is estimated to be about twenty feet wide. It has a culvert head at each end. The heads are about three and one-half to four feet wide (north and south) and extend about ten inches above the level of the driveway and are in line with a ditch along the south side of the state highway. At a point about one hundred yards west of the culvert the car left the concrete, ran off on the south shoulder of the road; proceeded easterly along said shoulder a distance of about one hundred yards, until it collided with the west end of the culvert above described where it turned over, severely injuring Dale Dossett, from which injuries he died two days later.

It appears from the evidence that at the time the car slipped off the pavement it was going at a rate of fifty or sixty miles per hour. The two Rhoades boys and the Hitt boy testified that the car did not slacken speed from the

accepted the invitation and got into the car. The car  
sat in the front seat with the driver and the two  
boys in the rear seat. After riding out a short  
a few miles they started back towards Hopdale. It was  
dark at the time, and was raining, which had been  
going for some time. The accident of the car was  
the visibility on account of the rain, which was  
poor, and the pavement was wet.

The accident happened about one and a quarter miles  
west of Hopdale, on the south side of the concrete. At  
this point, and some distance west of it, there is a ditch  
shoulder from six to eight feet wide. South of this shoulder  
is a ditch about two feet deep with sides that slope gradually.  
Across this ditch is a culvert over which runs a small bridge.  
private driveway that leads into a farm house. The culvert  
is estimated to be about twenty feet wide. It has a culvert  
head at each end. The head is about three and one-half  
to four feet wide (north and south) and extends across the  
inches above the level of the driveway and are in line with  
a ditch along the south side of the state highway. At a  
point about one hundred yards east of the culvert the car  
left the concrete, ran off on the south shoulder of the  
road; proceeded eastward along said shoulder a distance of  
about one hundred yards, until it collided with the west end  
of the culvert above described where it turned over, severely  
injuring Dale Bennett, from which injuries he died two days  
later.

It appears from the evidence that at the time the  
car slipped off the pavement it was going at a rate of fifty  
or sixty miles per hour. The two children boys and the girl  
boy testified that the car did not slacken speed from the

time it went off the pavement until it hit the culvert.

The defendant offered the testimony of Velde Rhoades taken before the Coroner's inquest which was to the effect that just before the accident Dale Dossett said something about looking at the gas gage. Bob, the boy who was driving, looked down and showed him where it was and at that time he ran off the road.

Three of the boys that were in the car at the time of the accident testified for the plaintiff. The only evidence offered by the defendant was the testimony of Velde Rhoades and Robert Hitt, given at the Coroner's inquest and the statements given by these two to an investigator, shortly after the occurrence. The jury returned a verdict of five thousand dollars for the plaintiff.

The defendant contends that the trial court committed prejudicial error in refusing to withdraw a juror and declare a mistrial on account of one of the prospective jurors answering an inquiry as to whether there was anything that would cause him to be inclined one way or the other. He answered: "I know the insurance company that is on this case. They are a neighbor of mine." Defendant then made a motion to withdraw a juror, and called for a mistrial. Plaintiff's counsel then stated to the court that the question was asked in complete good faith; that he did not intend nor expect to be answered in such a manner; that it is the usual question propounded to a prospective juror, to determine whether there was anything that would make the juror an unfair juror; that if the prospective juror was interrogated outside of the presence of the remainder of the jurors that

time it went off the pavement and it is the defendant's

The defendant offered the testimony of the witness

taken before the coroner's inquest which was held on the

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evidence offered by the defendant was the testimony of the

Rhodes and Robert Hill, David Hill and the other boys and

the statements given by these two of an instant story, shortly

after the occurrence. The jury believed the testimony of five

thousand dollars for the plaintiff.

The defendant contended that his trial court verdict

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propounded to a prospective juror, to determine whether

there was anything that would make the juror in doubt

juror; that if the prospective juror was interviewed

outside of the presence of the remainder of the jurors that



the facts would be produced to show that a few days prior to the calling of this case an employee of the insurance company by the name of Kenneth Kumpf, who was a friend of the particular juror knowing at the time that the juror was serving and had stated to the juror in a question: "You know my company has several cases on that calendar. One of them is the Dossett case." The plaintiff took the position that the juror would never have made the statement if it had not been for the conduct of the employee of the insurance company. The Court then states: "I am not going to examine the juror, but I think this Mr. Kumpf should be examined. Do you think, if this did happen, his statement would be immaterial?" Counsel for the defendant then states: "Yes, it would be immaterial from the standpoint of whether or not there is any prejudicial statement in the record. I think if this happened, Kumpf would be put on the pan." It appears that if the answer made by the juror was prejudicial it was brought about by the insurance company rather than by the plaintiff.

In the case of Williams v. Consumers Company, 352 Ill. 51, a similar matter occurred. The Court stated: "We are urged by defendant to reverse the judgment of the jury, the trial court and the Appellate Court because of a reply made by witness McCarthy wherein he mentioned an insurance company. After stating that he went to the Consumers Company the next morning to report the accident, McCarthy was asked by the attorney for plaintiff: "What did you do, if anything?" and he answered, "I went up there and explained to him, and he sent me to the insurance company." This answer was unresponsive to the question put, but the attorney for plaintiff immediately assured the court that

the facts would be produced to show that a few days prior to the calling of this case an employee of the insurance company by the name of Kenneth Karpis, who was a friend of the particular juror known at the time that the juror was arriving and had stated to the juror in a question: "You know my company has several cases on the calendar. One of them is the Foreest case." The plaintiff took the position that the juror would never have made the statement if it had not been for the conduct of the employee of the insurance company. The Court then states: "I am not going to examine the juror, but I think this Mr. Karpis should be examined. Do you think, if this did happen, his statement would be immaterial?" Counsel for the defendant then states: "Yes, it would be immaterial from the standpoint of whether or not there is any prejudicial statement in the record. I think if this happened, Karpis would be out on the spot." It appears that if the answer made by the juror was prejudicial it was brought about by the insurance company rather than by the plaintiff.

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he did not know that the witness was going to make such an answer. No motion was made by counsel for defendant to have the answer stricken nor did he request the court to instruct the jury to disregard the statement. Instead, he moved to withdraw a juror and to have the court declare a mis-trial. This motion was denied and the case proceeded. This ruling of the court is alleged to be erroneous, and numerous cases are cited where under different circumstances this court has at times reversed a judgment and remanded the cause where improper remarks and questions of an attorney have been asked a witness with the apparent purpose of informing the jury that an insurance company, rather than the party sued, would be liable for any damages assessed. We have examined these cases but find none where a mis-trial has ever been granted on account of an inadvertent or unresponsive answer of a witness to a legitimate inquiry. Generally, where prejudicial error has been declared it is found to have been due to some misconduct or improper remarks or questions of counsel, oft-times repeated, and calculated to influence or prejudice the jury. \* \* \* These and the other cases cited by defendant on this point are therefore to be distinguished from the case before us, where no misconduct or improper remark is ascribed to plaintiff's attorney, and where the trial judge was evidently satisfied that the witness had simply volunteered his unresponsive remark concerning the insurance company without any obvious design or intent, either on the part of the witness or the attorney, to prejudice defendant. \* \* \* Under these circumstances the ruling of the trial court in denying the motion for a mis-trial was correct."

In the present case defendant's counsel did not make any motion to have the answer stricken nor did he ask the court to instruct the jury to disregard the statement.

he did not know that the witness was going to make such an answer. No motion was made by counsel to discontinue the answer. The answer stricken nor did he request the court to instruct the jury to disregard the statement. In fact, he moved to withdraw a juror and to have the court declare a mistrial. This motion was denied and the case proceeded. This ruling of the court is alleged to be erroneous, and numerous cases are cited where under different circumstances the court has at times reversed a judgment and remanded the cause where improper remarks and questions of an attorney have been asked a witness with the apparent purpose of informing the jury that an insurance company, through the use of the party sued, would be liable for any damages recovered. We have examined these cases but find none where a mistrial has ever been granted on account of an inadvertent or unresponsive answer of a witness to a legitimate inquiry. Certainly, where prejudicial error has been decided it is found to have been due to some misstatement or improper remark or question of counsel, oft-times repeated, and calculated to influence or prejudice the jury. \* \* \* These and the other cases cited by defendant on this point are therefore to be distinguished from the case before us, where no misstatement or improper remark is ascribed to plaintiff's attorney, and where the trial judge was evidently satisfied that the witness had simply volunteered his unresponsive remark concerning the insurance company without any obvious design or intent, either on the part of the witness or the attorney, to prejudice defendant. \* \* \* Under these circumstances the ruling of the trial court in denying the motion for a mistrial was correct."

In the present case defendant's counsel did not make any motion to have the answer stricken nor did he ask the court to instruct the jury to disregard the statement.

Later in the trial the defendant called the investigator for the Insurance Company and had him testify that he acted in the capacity as an investigator for the insurance company and obtained the written statements from the witnesses shortly after the accident.

There was evidence introduced by the plaintiff tending to prove, that the accident happened upon a paved highway in the night time, when it was raining with a wet and slippery pavement; that the shoulders of the highway were soft and muddy, and that the visibility was poor. One witness testified that the driver of the car could see about twenty feet ahead; that under these hazardous conditions the defendant was operating his car at a high rate of speed; that he permitted his car to leave the concrete pavement and travel on the shoulder for about one hundred yards without reducing its speed; that he hit the culvert with such terrific force so as to cause the car to turn twice end over end. With this evidence in the record, it was proper for the trial court to submit the question of willful and wanton misconduct of the defendant to the jury.

In many cases an attempt has been made to define accurately the difference between ordinary negligence and willful and wanton misconduct. It is a very difficult thing to do. The more recent cases have been content with the statement that whether an act is willful and wanton depends on the particular circumstances of each case.

In Bernier v. Illinois Central R. R. Co., 296 Ill. 464, the Court said: "It is difficult, if not impossible, to lay down a rule of general application by which we may determine what degree of negligence the law considers

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the proposed changes to the law of the United Kingdom regarding the treatment of the British Commonwealth countries.

equivalent to a willful or wanton act. Whether an act is willful or wanton is greatly dependent upon the particular circumstances of each case. Where the omission to exercise care is so gross that it shows a lack of regard for the safety of others it will justify the presumption of willfulness or wantonness." In *Bremer v. L. E. & W. R. R. Co.*, 318 Ill. 11, it was said: "What degree of negligence the law considers equivalent to a willful or wanton act is as hard to define as negligence itself, and in the nature of things is so dependent upon the particular circumstances of each case as not to be susceptible of general statement." However, the decided cases seem to agree that one of the factors distinguishing a wilful and wanton act is, such absence of care for the person of another as exhibits a conscious indifference to consequences. *Farley v. Mitchell*, 282 Ill. App. 555. The case of *Murphy v. King*, 284 Ill. App. 74, states: "An intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal wilfulness."

Courts of review will not set aside verdicts on questions of fact unless said verdicts are against the manifest weight of evidence. We cannot hold under this record that the manifest weight of the evidence is against the verdict and judgment entered herein.

Complaint is made of what the defendant claims was improper and prejudicial remarks by the attorney for the plaintiff in his closing argument with the jury, but an examination of these remarks show that they were based on facts

equivalent to a willful or wanton act. The act in question is willful or wanton is greatly dependent upon the particular circumstances of each case. Where the omission to exercise care is so gross that it shows a lack of regard for the safety of others it will justify the assumption of willfulness or wantonness. In *People v. ...*, 318 Ill. 117, it was said: "The degree of negligence is a matter of degree and is willful or wanton as to the law considers equivalent to a willful or wanton act. It is hard to define as negligence itself, and in the absence of things is so dependent upon the particular circumstances of each case as not to be susceptible of general statement. However, the decided cases seem to show that one of the factors distinguishing a willful and wanton act is, such absence of care for the person of another as exhibits a conscious indifference to consequences. *People v. Mitchell*, 323 Ill. App. 555. The case of *People v. ...*, 323 Ill. App. 74, states: 'An intentional disregard of a known duty, necessarily to the safety of the person or property of another, and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, makes a case of conscious or intentional willfulness'."

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Complaint is made of what the defendant claims was improper and prejudicial remarks by the attorney for the plaintiff in his closing argument with the jury, but an examination of these remarks show that they were based on facts



within the record or statements of what the attorneys view of the law was covering the case and we find nothing of such inflammatory nature as would cause reversible error. We find nothing in the instructions of such a serious nature as to cause a reversal.

For the reasons set out herein the judgment of the Circuit Court is hereby affirmed.

JUDGMENT AFFIRMED.

within the record or statements of what the attorneys view  
of the law was covering the case and we find nothing of  
such inflammatory nature as would cause reversible error.  
We find nothing in the instructions or such a serious nature  
as to cause a reversal.

For the reasons set out herein the judgment of  
the Circuit Court is hereby affirmed.

JUDGMENT AFFIRMED.

Abstract

General number 9302.

Agenda number 7.

IN THE APPELLATE COURT  
OF ILLINOIS  
THIRD DISTRICT  
FEBRUARY TERM, A.D. 1942

LILLIAN HEPLER, : APPEAL FROM THE CIRCUIT COURT  
Plaintiff-Appellee, : OF TAZEWELL COUNTY.  
-vs- :  
GLEN MORRIS, :  
Defendant-Appellant :  
314 I.A. 376<sup>2</sup>  
HONORABLE HENRY S. BURMAN,  
Judge presiding.

HAYES, P. J.

The plaintiff herein recovered a judgment of four thousand dollars against the defendant for personal injuries sustained by her in an automobile accident which took place about 7:45 o'clock P.M. on May 31, 1937, at the intersection of a gravel road (which ran north and south) with U.S. Route 150 (which ran east and west).

Plaintiff was riding as a passenger in the rear seat of an automobile owned and driven by the defendant. She charges defendant with willful and wanton conduct in the operation of his car. The intersection in question was known as 'Chaiffer's Corners' situated about one mile south and one mile west of the village of Deer Creek in Tazewell County. At that point Route 150 is a concrete slab eighteen feet wide, and lies practically on a level for half a mile in each direction from the intersection. The gravel road intersects it at a right angle from the north. Going south on the gravel road from the intersection there is a ten foot jog to the east.

SECRET

General Order 1970

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

62-100000

UNITED STATES OF AMERICA  
vs.  
JOHN EDGAR HOOVER  
Defendant

Page 1

The first of the two photographs is a black and white photograph of a man in a suit and tie, standing in front of a building. The man is identified as John Edgar Hoover, Director of the Federal Bureau of Investigation. The second photograph is a black and white photograph of a man in a suit and tie, standing in front of a building. The man is identified as John Edgar Hoover, Director of the Federal Bureau of Investigation.

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There is a school house at the southwest corner of the intersection. On the northwest corner of the intersection was a grove of catalpa trees which extended north about two hundred feet on the west side of the gravel road. These, with some other trees, came up to the fence line. Some of the branches hung over the fence and extended to within six feet from the ground. On the west side of the graveled road, at this point, there was a ditch. On the west edge of the ditch and about five and one-half feet from the west fence there was a 'stop' sign, a short distance north of the concrete. This sign was about four feet high from the level of the gravel. On the northeast corner of the intersection was a set of farm buildings known as the Chaiffer homestead. The house was about one hundred feet north of the hard road, and one hundred and twenty feet east of the gravel road. There was a barn and a crib that stood north of the house. In front of the house and to the south and west were scattered trees in the house yard. The gravel road, at the intersection, was a little higher than the pavement and as one traveled north, the grade was up.

Glen Morris, the defendant, had lived all his life within ten miles of the place in question. It appears from the evidence that he had driven by this intersection within a short time prior to the collision. On the evening of the collision the five occupants of the car, all of whom lived in the city of Washington in Tazewell County, had started out from Washington to attend a church meeting at Lilly, which was southeast of Washington. They left Washington at about seven-thirty, with the defendant and his wife in the front seat, the defendant's sister, the plaintiff, and Ben Smith in the rear seat. After driving about eight miles, they passed the Deer Creek corner which

There is a school house at the southwest corner of the intersection. On the northwest corner of the intersection was a grove of catalpa trees which extended north about two hundred feet on the west side of the travel road. There, with some other trees, came up to the fence line. Some of the branches hung over the fence and extended to within six feet from the ground. On the west side of the travel road, at this point, there was a ditch. On the west side of the ditch and about five and one-half feet from the west fence there was a 'stop' sign, a short distance north of the concrete. This sign was about four feet high from the level of the gravel. On the northeast corner of the intersection was a set of lawn buildings known as the Olinier Homestead. The house was about one hundred feet north of the road, and one hundred and twenty feet east of the gravel road. There was a barn and a crib that stood north of the house. In front of the house and to the south and west were scattered trees in the house yard. The gravel road, at the intersection, was a little higher than the pavement and as one traveled north, the grade was up.

Olin Morris, the defendant, had lived all his life within ten miles of the place in question. It appears from the evidence that he had driven by this intersection within a short time prior to the collision. On the evening of the collision the five occupants of the car, all of whom lived in the city of Washington in Tatamall County, had started out from Washington to attend a church meeting at Lilly, which was southeast of Washington. They left Washington at about seven-thirty, with the defendant and his wife in the front seat, the defendant's sister, the plaintiff, and Ben Smith in the rear seat. After driving about thirty miles they passed the Lee Ferry where they

3.

was one mile north from the Chaffer Corner. After leaving this corner, defendant testified that he started looking for the hard road.

Plaintiff offered evidence to the effect that at the time they reached the Deer Creek corner, defendant's wife said to defendant 'they would soon be coming to the hard road'. There is also evidence that at a point thirty-five feet from the hard road, defendant's wife exclaimed: "Oh my God there is the hard road." This evidence was contradicted by the defendant and his wife.

The proof discloses that the defendant, at the time he entered the intersection, was traveling at about thirty-five to forty miles an hour; that he didn't see the car coming from the east until he was up to the intersection; that he put his brakes on but by that time his front wheel was on the slab on the north side of the black line, and that he then released the brakes and accelerated the speed of his car in order to clear. The other car caught him <sup>car</sup> near the rear.

Plaintiff contends that they have established willful and wanton conduct by the fact that the defendant drove through a stop sign across the intersection of a paved U.S. highway that he knew existed, and was heavily traveled, particularly on the Sunday following Decoration Day (this being a highway that connected Bloomington, Illinois to Peoria, Illinois) at a speed of forty miles an hour; that he was familiar with both the gravel road and the hard road and had knowledge and notice of all the surrounding circumstances, have <sup>ing</sup> passed this corner within a month prior to the time in question; that when he left Deer Creek corner

For the purpose of this report, the following information was obtained from the records of the Department of the Interior, Bureau of Land Management, and the Bureau of Reclamation, and from the records of the Department of the Army, Corps of Engineers, and the Department of the Navy, Bureau of Naval Facilities.

On the 1st of May 1968, the defendant was interviewed by the police and stated that he had no recollection of the events of the 2nd of May 1968. He stated that he had no recollection of the events of the 2nd of May 1968. He stated that he had no recollection of the events of the 2nd of May 1968.

[illegible]

The time in question; that when he left Great Britain  
at about 11:30 p.m. on the night of the 1st of January 1968,  
and had knowledge and notice of all the circumstances  
on his flight, with both of his travel agent and his  
P.O. (Illinois) as a speed of forty miles an hour; that  
being a highway that connects Mississippi, Illinois and  
particularly on the United States (Illinois) (this  
U.S. highway that he knew existed, and was heavily traveled,  
drove through a stop sign before the intersection of a  
Willis' and William corners of the fact that the defendant  
did not know that they were situated



he knew the hard road was within a mile and that he was driving with his 'dims' rather than his 'brights'; that he neither looked to the right or the left as he came up to the hard road; that he didn't look for cars until his front wheels were actually on the slab; that he did not see the stop sign; that he did not slacken his speed even though he knew he was close to the paved road; that he failed to observe the 'wing-out' at the intersection of the slab, and that he failed to see the white School House at the intersection.

The defendant contends that plaintiff failed to make out a case of willful and wanton conduct on account of the elevation of the gravel in relation to the hard road; that defendant did not see the pavement in time; that on account of the grove of trees a shadow was cast so that he did not see the stop sign; and that on his left-hand side the set of buildings, trees and shrubs around the farm house shut off his view of the approaching Simmons car.

Under our statute a guest cannot establish a cause of action for personal injuries unless such accident shall have been caused by willful and wanton misconduct of the driver in the operation of the car. Ill. Rev. Stats 1937, Ch. 95 $\frac{1}{2}$ , section 58a.

In many cases an attempt has been made to define accurately the difference between ordinary negligence and willful and wanton misconduct. It is a very difficult thing to do. The more recent cases have been content with the statement that whether an act is willful and wanton depends on the particular circumstances of each case.



In *Bernier v. Illinois Central R.R. Co.*, 296 Ill. 464, the Court said: "It is difficult, if not impossible, to lay down a rule of general application by which we may determine what degree of negligence the law considers equivalent to a willful or wanton act. Whether an act is willful or wanton is greatly dependent upon the particular circumstances of each case. Where the omission to exercise care is so gross that it shows a lack of regard for the safety of others it will justify the presumption of willfulness or wantonness." In *Bremer v. L. E. & W. R.R. Co.*, 318 Ill. 11, it was said: "What degree of negligence the law considers equivalent to a willful or wanton act is as hard to define as negligence itself, and in the nature of things is so dependent upon the particular circumstances of each case as not to be susceptible of general statement." However, the decided cases seem to agree that one of the factors distinguishing a wilful and wanton act is, such absence of care for the person of another as exhibits a conscious indifference to consequences. *Farley v. Mitchell*, 282 Ill. App. 555.

In the case of *Murphy v. King*, 284 Ill. App. 74, it is stated: "An intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, make a case of constructive or legal wilfulness."

Section 167 of Ch. 95 $\frac{1}{2}$  Ill. Rev. Stats, provides that the Department may in its discretion and when traffic conditions warrant such action give preference to traffic upon any of the State highways under its jurisdiction, upon which has been constructed a durable hard-surfaced road over

In *Dunnell v. Illinois Central R.R. Co.*, 200 Ill. App. 3d 111, the court said: "It is difficult, if not impossible, to lay down a rule of general application by which to determine what degree of negligence the law considers sufficient to constitute a willful or wanton act. Whether an act is willful or wanton is greatly dependent upon the particular circumstances of each case. Where the omission to exercise care is so gross that it shows a lack of regard for the safety of others it will justify the presumption of willfulness or wantonness." In *Turner v. I. & M. R.R. Co.*, 313 Ill. App. 3d 111, it was said: "What degree of negligence the law considers equivalent to a willful or wanton act is as hard to define as negligence itself, and in the absence of things is no dependent upon the particular circumstances of each case as not to be susceptible of general statement." However, the decided cases seem to agree that one of the factors distinguishing a willful and wanton act is, such conduct of care for the person or another as exhibits a conscious indifference to consequences. *Kearley v.息斯利*, 232 Ill. App. 3d 111.

In the case of *Murphy v. R.R.*, 234 Ill. App. 3d 111, it is stated: "An intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal willfulness."

Section 107 of Ch. 221 Ill. Rev. Stat., provides that the Department may in its discretion and when traffic conditions warrant such action give preference to traffic upon any of the State highways under its jurisdiction, upon which has been constructed a multiple lane divided road over

traffic crossing or entering such highway by erecting appropriate stop signs and in such case vehicles entering upon or crossing such highway shall come to a full stop as near the right-of-way line of such highway as possible and regardless of direction shall give the right-of-way to vehicles upon such highway.

It is a matter of common knowledge that the public use the state roads so as to create a heavy travel condition and one coming on a state road is charged with notice of the probability of the presence of through traffic traveling at a high rate of speed and having the right of way over intersecting travel, and he is required to exercise a higher degree of care than is required at places less frequently traveled. His entering a state route without stopping and without ascertaining whether or not there is approaching cars from either direction may be such an act that under the particular circumstances of the case be so reckless as to warrant a jury in finding a total disregard for life or a general disposition to do injury. *Gavurnik v. Miller*, 283 Ill. App. 472; *Heidenreich v. Brenner*, 260 Ill. 439; *Neice v. Chicago & Alton R. R. Co.*, 254 Ill. 595; *McCarty v. Yates & Co., Inc.*, 294 Ill. App. 474.

The evidence alone, offered by the plaintiff, would justify an inference of such a reckless disregard of the safety of the persons in the car, as well as those on the state highway, as would amount to wanton and willful misconduct. On that ground the court did not err in submitting the issue to the jury.

There was a conflict in the evidence on the question of whether the branches of the trees that hung over

traffic control on either side of the highway, and in some cases the use of one-way traffic. It is also possible that the use of one-way traffic on the highway would be a more effective method of controlling traffic than the use of one-way traffic on the highway. It is also possible that the use of one-way traffic on the highway would be a more effective method of controlling traffic than the use of one-way traffic on the highway.

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The evidence in this case is that the use of one-way traffic on the highway is a more effective method of controlling traffic than the use of one-way traffic on the highway. It is also possible that the use of one-way traffic on the highway would be a more effective method of controlling traffic than the use of one-way traffic on the highway. It is also possible that the use of one-way traffic on the highway would be a more effective method of controlling traffic than the use of one-way traffic on the highway.

There was a conflict in the evidence on the question of whether the presence of the trees had any effect on the use of one-way traffic on the highway. It is also possible that the use of one-way traffic on the highway would be a more effective method of controlling traffic than the use of one-way traffic on the highway.

the fence, on the west side of the gravel road interfered with the vision of one approaching the hard road from the north. A number of plaintiff's witnesses testified that these branches did not obstruct the view of the 'stop sign' at the corner, and the weight of evidence seems to establish that the lowest of any of the branches was six feet from the ground while the 'stop sign' was four feet from the ground.

The evidence discloses that it was dusk and the Simmons car approaching the intersection from the east on the hard road had its headlights on; also that the defendant had his dimmers on. It further appears from the greater weight of the evidence that although the set of buildings were a partial obstruction to the view from the east, there were open spaces between the several buildings so that the defendant could see the hard road for a distance east of the intersection, had he looked.

The theory of the defense might apply if the defendant was driving in a strange community and making his first trip, then the recklessness of entering a paved road, without stopping or ascertaining what traffic was approaching, might be excused on the ground that he didn't have an opportunity to know the pavement was there, and that the circumstances were such as not to put him upon notice, but this theory is hardly tenable on this record, where under defendant's own testimony he knew that the pavement was within a mile after reaching the Deer Creek corner, and that he started watching for it. It further appears that he passed this intersection about three weeks prior to the day in question.

It is hard to visualize a more reckless attitude than the one of an automobile driver pulling on to one of the

the fence, on the west side of the gravel road intersecting with the vision of one approaching the east road from the north. A number of plaintiff's witnesses testified that these branches did not obstruct the view of the 'stop sign' at the corner, and the weight of evidence seems to establish that the lowest of any of the branches was six feet from the ground while the 'stop sign' was four feet from the ground.

The evidence discloses that it was not until the defendant car approaching the intersection from the east on the hard road had its headlights on; also that the defendant had his glasses on. It further appears that the greater weight of the evidence shows that although the act of looking was a partial obstruction to the view from the east, there were open spaces between the several buildings so that the defendant could see the hard road for a distance east of the intersection, had he looked.

The theory of the defense is that if the defendant was driving in a state of inattention and taking his first trip, then the recklessness of entering a paved road, without stopping or ascertaining what traffic was approaching, might be excused on the ground that he didn't have an opportunity to know the pavement was there, and that the circumstances were such as not to put him upon notice, but this theory is hardly tenable on this record, where under defendant's own testimony he knew that the pavement was within a little after reaching the Deer Creek corner, and that he started watching for it. It further appears that he passed this intersection about three weeks prior to the day in question.

It is hard to visualize a more reckless attitude than the one of an automobile driver driving on to one of the



paved state roads that is known to be heavily traveled, with fast moving traffic that has the right of way, without first stopping and ascertaining the approach of traffic from each way. The peril to himself and to the life and limb of others is great. Conduct that may amount to mere negligence at ordinary intersections may be converted into wanton and willful misconduct by reason of these highly dangerous factors that necessarily accompany traffic conditions at intersections with state paved roads.

Ill-will is not a necessary element of a wanton act. To constitute a wanton act the party doing the act or failing to act must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury. An intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal willfulness, such as charges the person whose duty it was to exercise care with the consequences of a willful injury. *Jeneary v. C. & I. Traction Co.*, 306 Ill. 392.

Complaint is made on the ruling of the trial court on the limitations of cross examination of two of the witnesses, also on the giving and refusing of instructions. We do not find anything of such serious nature in this connection as to require a reversal, neither can we hold on this record that the finding and verdict of the jury was against the manifest weight of the evidence.

There is no error appearing in this record which justifies

paved state roads that is known to be heavily traveled, with  
fast moving traffic that has the right of way, without first  
stopping and ascertaining the approach of traffic from each  
way. The peril to himself and to the life and limb of  
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the consequences of a wilful injury. *Tennant v. City of I.*  
*Traktion Co., 306 Ill. 382.*

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the witnesses, also on the giving and refusing of instruc-  
tions. We do not find anything of such serious nature in  
this connection as to require a reversal, neither can we  
hold on this record that the finding and verdict of the  
jury was against the manifest weight of the evidence.  
There is no error appearing in this record which justifies

a reversal of the judgment.

For the reasons given herein the judgment of the  
Circuit Court is affirmed.

JUDGMENT AFFIRMED.

a reversal of the judgment.

For the reasons just stated, the Court is of the

opinion that the judgment should be affirmed.

REVEREND JUSTICE.

Abstract

314 I.A. 377

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

FEBRUARY  
October Term, A.D. 1946

Gen. No. 9301.

Agenda No. 6.

P.M. McConathy,  
Plaintiff-Appellee,

-vs-

W.L. McConathy as Executor of  
the Last Will and Testament  
of Mary J. McConathy, deceased,  
and as Administrator pro tem  
of Mary J. McConathy, deceased,  
Defendant-Appellant.

Appeal from

Circuit Court

Montgomery County.

Fulton J:

On March 1, 1938, Appellee filed a claim for \$632.05, against the Estate of his mother Mary J. McConathy in the Probate Court of Montgomery County. The claim consisted of two items. Claim No. 1, was for \$150.00 for services rendered his mother in looking after her farm for the last three years prior to her death. Claim No. 2, was for a real estate commission paid by Appellee for the sale of his Mothers farm and expenses amounting to \$482.05. The County Court allowed the claim for \$150.00, and disallowed the balance. The Appellant appealed to the Circuit Court from the order allowing the \$150.00 claim and the Appellee appealed from the order disallowing the balance. In the Circuit Court the appeals were consolidated and heard together. After proofs were taken judgment was entered in favor of the Appellee for the full amount of both claims in the sum of \$632.05. It is from that judgment that Appellant brings an appeal to this Court.

abstract

311A.277

STATE OF ILLINOIS  
APPELLATE COURT  
CHIEF JUSTICE

February 1, 1935  
Circuit Court, Montgomery County

Appellate No. 6.

Gen. No. 9301.

P.M. McGonathy,  
Plaintiff-Appellee,

-vs-

W.L. McGonathy as executor of  
the last will and testament  
of Mary J. McGonathy, deceased,  
and as Administrator of the  
estate of Mary J. McGonathy, deceased,  
Defendant-Appellant.

Appeal from  
Circuit Court  
Montgomery County.

Pinion 1:

On March 1, 1935, Appellee filed a claim for \$21.00,  
against the Estate of his mother Mary J. McGonathy in the  
Probate Court of Montgomery County. The claim consisted of  
two items. Claim No. 1, was for \$10.00 for services  
rendered his mother in looking after her from the last  
three years prior to her death. Claim No. 2, was for a cash  
estate commission paid by Appellee for the sale of his mother's  
farm and expenses amounting to \$11.00. The County Court  
allowed the claim for \$21.00, and allowed the balance.  
The Appellant appealed to the Circuit Court from the order  
allowing the \$10.00 claim and the Appellee appealed from the  
order disallowing the balance. In the Circuit Court the appeals  
were consolidated and heard together. After proofs were taken  
judgment was entered in favor of the Appellee for the full  
amount of both claims in the sum of \$21.00. It is from this  
judgment that Appellant brings an appeal to this Court.

A claimant against an estate to which objection is made has the burden of establishing his claim. *Grandall v. The Carey Lombard Lumber Co.* 164 Ill.474. In this case the claimant was a son of the decedent.

In support of Claim No. 1, Plaintiff introduced in evidence a Power of Attorney from his Mother authorizing him to have control over her 100 acre farm giving him authority to rent the same, collect the rents, keep it insured, repaired, etc. He further submitted oral testimony as to the value of similar services being \$50.00 per year. There is no evidence, however, either as a part of the Power of Attorney or in the oral proof of any contract, either express or implied, covering compensation for the management of said farm.

In *Vogel v. Murphy, Executor*, 182 Ill.App.631, the rule covering such services is announced as follows:

"Where services are rendered by or to one admitted into the family as a relative, the presumption of law is that such services are gratuitous, and that the parties do not contemplate payment therefor. But this presumption may be overcome by proof, either of an express contract or of facts and circumstances which show that both parties, at the time the services were rendered, intended pecuniary recompense, other than that which arises naturally out of the family relation." Citing *Heffron v. Brown*, 155 Ill.322.

In *Moreen v. The Estate of Carlson*, 365 Ill.482, the Court said that in such cases it was only required that claimant produce sufficient evidence of a contract, express or implied to negative any presumption that the services were gratuitously performed. We do not feel that claimant has met that test in support of his Claim No. 1.

A claimant against an estate to which objection is made has the burden of establishing his claim. *Grinnell v. The Carey Lumber Co.*, 104 Ill. 474. In this case the claimant was a son of the decedent. In support of Claim No. 1, the claimant introduced in evidence a Power of Attorney from his mother authorizing him to have control over her 100 acres farm giving him authority to rent the same, collect the rents, keep it insured, repaired, etc. He further submitted oral testimony as to the value of similar services being \$25.00 per year. There is no evidence, however, either in the report of the Attorney or in the oral proof of any contract, either express or implied, covering compensation for the management of said farm.

In *Vogel v. Murphy*, 133 Ill. 471, the rule covering such services is announced as follows: "Where services are rendered by one to another, and the family as a whole, the presumption of law is that such services are gratuitous, and that the parties do not contemplate payment therefor. But this presumption may be overcome by proof either of an express contract or of facts and circumstances which show that both parties at the time the services were rendered, intended pecuniary recompense, other than that which arises naturally out of the family relation." *Citing Nelson v. Brown*, 125 Ill. 252.

In *Hansen v. The Estate of Carlson*, 305 Ill. 432, the Court said that in such cases it was only required that claimant produce sufficient evidence of a contract, express or implied to negative any presumption that the services were gratuitously performed. We do not feel that claimant has met that test in support of his Claim No. 1.



In support of Claim No. 2, for "Real estate commission paid for the sale of the land and expenses", the Appellee offered in evidence the same general Power of Attorney to act as Agent, which was dated in April, 1933, and a contract between Appellee and a real estate agent, W.J. England, to sell his Mothers farm, dated December 24, 1936. Also an oral stipulation which stated that on May 11, 1937, one William J. England obtained judgment in a Police Court against Appellee for \$450.00, and costs and that the subject matter of the suit was for real estate commissions for sale of the Mary J. McConathy farm; that Appellee had paid the said judgment and costs amounting to \$482.05.

The files in the Mary J. McConathy estate show that she died on January 28, 1937. The testimony does not disclose any fact tending to show that the sale of the farm was made before or after that date. The rule of law is well established that the death of a principal terminates the agency in the absence of circumstances giving the agent any authority coupled with an interest. There is no such interest shown in Appellee as to make his agency irrevocable. *Levy v. Wilmes* 239 Ill.App. 229.

The fact that the contract to sell given the real estate broker England, is for a definite period, which at the time of death has not yet expired, does not vary this rule. If the sale was made before the death of the Mother, that fact should have been definitely shown in the proof together with other facts and circumstances surrounding the sale. Burden of proving claim against estate of decedent is upon claimant whose evidence will be scrutinized with great care by the court. In *Re: Estate of Teehan*, 287 Ill.App. 58.

[illegible]

Because the testimony in support of both claims one and two is lacking in essential elements necessary to sustain the judgment of the Circuit Court and because there is a possibility that competent and convincing evidence is available, the said judgment is reversed and the cause remanded to the Circuit Court of Montgomery County for a new trial.

REVERSED and REMANDED.

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available, the first judgment in the  
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314 L.A. 377<sup>2</sup>

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

FEBRUARY  
October Term, A.D. 1941.

Gen. No. 9313.

Agenda No. 15.

James A. Huddleston, )  
Plaintiff-Appellee, )  
-vs- )  
S.B. Ebert, )  
Defendant-Appellant. )

Appeal from  
Circuit Court  
Sangamon County.

Fulton J:

On January 8, 1941, the Appellant listed his 12 acre farm for sale with Appellee, the agreement being set forth in writing and signed by both parties. On February 26, 1941, the Appellee entered into an agreement with one D.O. Christy to sell the land at the price and in accord with the terms set out in the original sales agreement. When notified of the sale, Appellant refused to perform and rescinded his contract.

Appellee brought suit in a Justice Court against the Appellant and recovered a judgment in the sum of \$60.00. On appeal to the Circuit Court, the case was tried before a jury who returned a verdict for the same amount in favor of Appellee, and it is from a judgment on this verdict that Appellant appeals to this Court.

Postscript

91-11-277

STATE OF ILLINOIS  
APPELLATE COURT  
JANUARY 1941

James A. Haddleton, Appellant,  
vs.  
S.B. Ebert, Defendant-Appellee.

Gen. No. 9313

James A. Haddleton,  
Appellant-Appellee,  
vs.  
S.B. Ebert,  
Defendant-Appellant.

Special Order  
Circuit Court  
Southern County

Section 1:

On January 8, 1941, the Appellant listed his 12 acre farm for sale with Appellee, the agreement being set forth in writing and signed by both parties. On February 26, 1941, the Appellee entered into an agreement with one H.A. Gentry to sell the land at the price and in accord with the terms set out in the original sales agreement. When notified of the sale, Appellant refused to perform and rescinded his contract.

Appellee brought suit in a Justice Court against the Appellant and recovered a judgment in the sum of \$20.00. On appeal to the Circuit Court, the case was tried before a jury who returned a verdict for the same amount in favor of Appellee, and it is from a judgment on this verdict that Appellant appeals to this Court.

The questions of law raised by Appellant on this record are without merit, and the questions of fact have all been passed upon adversely to Appellant. First, by a Justice of the Peace, where judgment for \$62.00, was rendered against him, second, by the verdict of a jury in the Circuit Court of Sangamon County for the same amount and third, by the denial of a motion for a directed verdict and the overruling of a motion for a new trial by a very able and learned trial Court. In passing upon this case he punctuated his remarks by some very positive and definite statements with all of which we are in accord.

While we believe thoroughly in allowing every party his day in court, if possible, we do not feel like encouraging continuous appeals over trivial amounts and questions of small moment.

In any event, we do not find that the verdict of the jury was against the manifest weight of the evidence, and therefore, would not be justified in reversing the judgment on that ground. There is sufficient evidence in the record to sustain the verdict of the jury and the judgment of the Circuit Court is affirmed.

AFFIRMED.





Abstract

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

FEBRUARY  
October Term, A. D., 194<sup>2</sup><sub>7</sub>.

General No. 9310.

Agenda No. 14.

JOHN KOCH, )  
Plaintiff Appellee, )  
-vs- )  
CLARA BARKER, )  
Defendant Appellant. )

Appeal from  
Circuit Court,  
Tazewell County.

3141.A. 378

RIESS, J.:

John Koch, plaintiff appellee herein, filed a suit at law in the Circuit Court of Tazewell County on November 24, 1939, seeking recovery of damages for personal injuries and financial loss resulting from the alleged negligent driving and operation by defendant appellant, Clara Barker, of her automobile on August 8, 1938. Trial by jury resulted in a verdict against the defendant in the sum of \$13,500, upon which judgment in favor of the plaintiff was entered after defendant's motions for directed verdicts, judgment notwithstanding the verdict and to set aside the verdict and grant a new trial had been denied by the Trial Court. This appeal then followed.

The complaint consisted of four counts wherein it was alleged that the plaintiff, while in the exercise of due care for his own safety, was injured as the direct and proximate result of defendant's general negligence; negligent failure to drive her automobile under safe and proper control; driving with brakes inadequate to stop her automobile and while the brakes were not in good working order. Defendant, by

100-20000

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TO: SAC, NEW YORK (100-20000)

FROM: SAC, NEW YORK (100-20000)

General No. 100-20000

JOHN KOCZ, JR.

Plaintiff Appellant

-vs-

GRANBAUGH, JR.

Defendant Appellant

PLINTS, J.

John Kocz, Jr., Plaintiff, vs. Granbaugh, Jr., Defendant, Appeal from the Circuit Court of the County of New York, No. 100-20000, decided in the County of New York, No. 100-20000, on November 10, 1963, resulting in a judgment for the defendant.

The plaintiff seeks reversal of the judgment and an award of costs. The plaintiff alleges that the defendant was negligent in the operation of his automobile on August 1, 1963, at the intersection of the defendant's automobile and the plaintiff's automobile, resulting in a verdict in favor of the plaintiff.

The plaintiff alleges that the defendant was negligent in the operation of his automobile on August 1, 1963, at the intersection of the defendant's automobile and the plaintiff's automobile, resulting in a verdict in favor of the plaintiff.

The plaintiff alleges that the defendant was negligent in the operation of his automobile on August 1, 1963, at the intersection of the defendant's automobile and the plaintiff's automobile, resulting in a verdict in favor of the plaintiff.

The complaint consisted of four counts, the first of which alleged that the plaintiff was injured as the direct and proximate result of the defendant's negligence; negligent failure to drive his automobile with care and proper control; driving with brakes inoperative; and while the brakes were not in good working order. The complaint was filed in the County of New York, No. 100-20000, on November 10, 1963, resulting in a judgment for the defendant.

her answer, denied that the plaintiff was in the exercise of ordinary care and denied all charges of negligence by her.

Defendant appellant, in her assignment of errors and argument, contends that the plaintiff failed to prove that he was in the exercise of ordinary care and caution for his own safety or that his injuries were proximately caused by negligence on the part of the defendant; that the Court erred in admitting certain evidence over defendant's objection; in overruling motions for a directed verdict for defendant at the close of plaintiff's evidence and of all the evidence; in refusing certain of defendant's instructions and in denying motions for judgment non obstante veredicto, for new trial, and in entering judgment on the verdict. Defendant further contends that the amount of the verdict is grossly excessive and was the result of sympathy, passion, prejudice and improper argument of plaintiff's counsel.

Plaintiff Koch, age seventy one years, a bridge tender on an Illinois River bridge extending between Peoria and East Peoria, Illinois, was struck and injured at about 3:10 in the afternoon of August 8, 1938, while engaged in closing an iron latticed gate of a length of twenty six feet by five and a half feet in height extending across the driveway of said bridge, in order to raise and open the seventy three foot span of a lift or jackknife bridge to permit the passage of a steamboat then approaching the bridge from a northerly direction.

Plaintiff's witness Clifford testified in substance that he was a bridge tender on this bridge since 1937; that he went off duty and was succeeded by plaintiff Koch at 2:30 P. M. on the day of plaintiff's injury; that their duties were similar and included handling the bridge for vehicular and boat traffic over and through the same; that to handle traffic it was necessary for the bridge tender in charge to first close the east gate on the East Peoria or Tazewell County side of the bridge, then proceed to the westerly portion and close two gates each extending to the middle of the

[illegible]

bridge on the westerly or Peoria side; then return and open the east gate and permit vehicular traffic which had accumulated on the lift portion of the bridge to proceed eastwardly; then close this gate, leaving the lift portion between the gates free of vehicles, and go into the control house on the northerly side of the bridge near the east gate and throw the switches to raise the bridge and permit passage of the boat.

Plaintiff Koch testified that a short time prior to closing the east gate of the bridge, he had received a whistle signal of the approach of a boat from the north and had turned on a siren to notify the boat captain that his signal had been heard, which siren can be heard at a distance of a thousand feet. Plaintiff then turned on the switch on the stop light and on two red lights located on the gate, all acting on the same switch; that he then picked up a red flag and proceeded from the control house and swung the hinged gate on the East Peoria side across the highway and latched it to a girder on the south side of the bridge. The bridge, gates, lift and highway across the same are shown by photographs and scale maps exhibited and admitted in evidence.

Plaintiff testified that the red lights on the east gate were in good condition and in operation; that he proceeded to close the gate while holding the red flag in his right hand on top of the gate and the handle of the catch on the end of the gate in his left hand, thus proceeding across the bridge. He permitted two automobiles going at a speed of about five miles per hour to pass and observed that there was no other traffic on the bridge; that he closed and latched the gate to a girder on the southerly side of the bridge; that it was necessary to watch and properly latch the handle into the slot located on the girder; that during this time the red flag was displayed in his right hand on top of the gate in full view of any approaching traffic; that he latched the gate and proceeded to step away at the moment that defendant's

bridge on the west side of the bridge; then return and open the east gate and permit vehicular traffic which was accumulated on the left portion of the bridge to proceed eastwardly; then close this gate, leaving the left portion between the gates free of vehicles, and go into the control house on the northern side of the bridge near the east gate and throw the switches to raise the bridge and permit passage of the boat.

Plaintiff then testified that a short time prior to closing the east gate of the bridge, he had received a whistle signal of the approach of a boat from the north and had turned on a light to notify the boat captain that the signal had been heard, which signal can be heard at a distance of a thousand feet. Plaintiff then turned on the switch on the stop light and on two red lights located on the gate, all acting on the same switch; that he then picked up a red flag and proceeded from the control house and swung the closed gate on the East Peoria side across the highway and indicated it to a girder on the south side of the bridge. The bridge, gates, lift and highway across the same are shown by photographs and aerial maps exhibited and admitted in evidence.

Plaintiff testified that the red light of the east gate were in good condition and in operation; that he proceeded to cross the gate while holding the red flag in his right hand and on top of the head of the handle of the catch on the end of the gate in his left hand, thus proceeding across the bridge. He permitted two automobiles going at a speed of about five miles per hour to pass and observed that there was no other traffic on the bridge; that he closed and latched the gate to a girder on the southern side of the bridge; that it was necessary to watch and properly latch the handle into the slot located on the girder; that during this time the red flag was displayed in his right hand on top of the gate in full view of any approaching traffic; that he latched the gate and proceeded to step away at the moment that defendant's

automobile crashed through the gate without having sounded any horn or signal of its approach; that he was struck by the gate and thrown eastward twelve to fifteen feet along the girder on the southerly side of the bridge; that he took hold of his leg and pulled it out of the road with the bone protruding through his boot; that he was struck and cut in his head and nose; his shoulder injured and that he was taken to the hospital.

The X-rays and physician's testimony showed that both the tibia and fibula of his right leg were broken through and shattered transversely in the upper third thereof and were overlapping; that he sustained great pain and suffering, followed by pneumonia; that the protruding bone was replaced and the fractured leg reduced and placed in a plaster cast from the hip to the toes and his scalp injuries sutured; that at intervals of two or three months, the casts were removed and X-rays taken on four occasions; that when the second cast was applied in October following the injury in August there was no union in the leg and the bone fragments were still moveable; that he could not walk and was obliged to move about with assistance on two crutches; that on December 3, 1938, X-rays again were taken showing some bone formation but no complete healing; that on February 18, 1939, X-ray examination and pictures showed more callous formation and slow healing; that on June 3, 1939, about ten months after the date of the injury, the bony fragments were in the same position and still showed motion in the fracture of the tibia; that the leg was still swollen in the injured area; that on March 13, 1941, two years and seven months after the injury, there was a bony union bridged across from the tibia to the fibula in an abnormal condition; that in the treating physician's opinion, based upon reasonable medical certainty, the plaintiff had reached his maximum state of improvement; that his injuries and present condition is permanent and that he is and will be unable to perform work of any kind; that he requires the use of two canes in walking and

responsible channel through the gate without having obtained any form of signal of its approach; that he was carried by the gate and thrown eastward twelve to fifteen feet along the ground on the easterly side of the bridge; that he took hold of his leg and pulled it out of the road with the bone protruding through his foot; that he was carried and out in his head and nose; his shoulder injured and that he was taken to the hospital.

The X-rays and physician's testimony showed that both the tibia and fibula of his right leg were broken through and shattered transversely in the upper third almost and were overlapping; that the protruding bone was released and the fractured leg reduced and placed in a plaster cast from the hip to the foot and his scalp injuries healed; that at intervals of two or three months, the casts were removed and X-rays taken on four occasions; that when the second cast was applied in October following the injury in August there was no union in the leg and the bone fragments were still movable; that he could not walk and was obliged to move about with crutches on two crutches; that on December 3, 1938, X-rays again were taken showing some bone formation but no complete healing; that on February 18, 1939, X-ray examination and pictures showed more definite formation and slow healing; that on June 3, 1939, about ten months after the date of the injury, the bone fragments were in the same position and still showed motion in the fracture of the tibia; that the leg was still swollen in the injured area; that on March 13, 1941, two years and seven months after the injury, there was a bony union bridged across from the tibia to the fibula in an abnormal condition; that in the treating physician's opinion, based upon reasonable medical certainty, the plaintiff had reached his maximum state of improvement; that his injuries and present condition is permanent and that he is and will be unable to perform work of any kind; that he requires the use of two canes in walking and



that pain and suffering still prevail, with limited motion of the knee and ankle joints. Plaintiff further testified that since his injury, his aches and pains awaken him or keep him awake at night; that prior to his accident, his general health had been good and that he had never suffered any previous injury; that he had actively engaged in hard work all his life and was reared and lived upon a farm until he became of age; that he has been unable to do work of any kind since his injury. The evidence further discloses that plaintiff's earnings were fifty dollars per month, working alternately two weeks per month at twenty five dollars per week, and had been so employed as a bridge tender for more than one year prior to his injury; that he sustained financial obligations of ambulance, physician and hospital bills aggregating in excess of eight hundred dollars in addition to loss of past and future wages resulting from the injury; It further so appears that the term of his expectancy of life approximates ten years. At the time of the injury, witnesses testified that defendant's car was approaching at speeds variously estimated from fifteen to thirty miles an hour; that it was raining; that the wooden floor of the bridge was wet and slippery; that on the bridge approach, stop signs, red light signs and a sign reading "Slow - Slippery When Wet" were in plain view and their presence was known to the defendant; that she had crossed this bridge on many occasions during her thirty years practice of osteopathy in going between Peoria and her home in Eureka, Illinois.

Defendant appellant, Clara Barker, was cross examined by plaintiff's counsel under Section 60 of the Civil Practice Act and also testified in her own behalf, together with certain other defendant's witnesses. She testified in substance that both she and her husband were licensed osteopathic physicians and had practiced in Eureka, Illinois, for thirty two years; that she occasionally drove to Peoria and on many occasions travelled over the Franklin Street bridge; knew it was a lift bridge and had seen it lifted and that it was lifted to

that case and suffering, still greater, it is said, from the loss of his limbs and entire joints. Plaintiff further testified that since his injury, his clothes and hair were washed but on his face at night; that when to his residence, his General Health had been such that he had never suffered any previous injury; that he was only engaged in hard work all his life and was treated as a laborer until he was about 40 years of age; that he had been unable to do any work since his injury. The evidence further showed that Plaintiff's earnings were fifty dollars per month, whereas immediately before his injury he received five dollars per week, and he had been an employee of a bridge company for more than ten years prior to his injury; that he sustained substantial obligations of maintenance, physician and hospital bills aggregating in excess of eight hundred dollars in addition to loss of past and future wages resulting from his injury. It further appeared that the loss of his expectancy of life was approximately ten years. At the time of the injury, witnesses testified that defendant's car was moving at a speed variously estimated from fifteen to twenty miles an hour; that it was raining; that the wooden floor of the car was wet and slippery; that on the bridge approach, stop signs, and a light were reading "Slow - Slippery Road Ahead" and that Plaintiff was present and known to the defendant; that the car stopped and struck on many occasions during her early years of occupation of property in both between Peoria and her home in Urbana, Illinois. Defendant's appeal, Oliver Barker, was once returned by Plaintiff's counsel under Section 65 of the Civil Practice Act and also testified in her own behalf, together with the other defendants' witnesses. The testimony in some cases that both the car and defendant were licensed as motor vehicle operators and had licenses in Illinois, for thirty-two years; that she occasionally drove to Peoria and on many occasions traveled over the Peoria and Urbana roads; that it was a life bridge and had been in place and was in place to

permit the passage of boats on the river; that the accident in question occurred shortly after three o'clock on the afternoon of August 8, 1938; that she had been to the City of Peoria, was on her way home and was travelling alone in the automobile; that it had rained hard all day and was drizzling when she approached the bridge from Peoria to East Peoria in an easterly direction; that there were signs along the side of the bridge; that Exhibit 3 is a stop sign shown on the picture which was there on that day in full view as she went over the bridge; that there was a sign on the right girder which said "Slow - Slippery When Wet" which was in full view as she crossed on that day; that she first saw Koch when at the crest of the lift bridge about one hundred feet west of the first girder toward Peoria; that he was then at the end of the gate and had started across the bridge with the gate when she saw him; that he must have been three feet out; that when her automobile came in contact with the gate, Koch was not entirely across; that the gate was open about two or three feet when she struck it, not closed at the time of impact; that she saw the gate move across the bridge but didn't observe Mr. Koch because he was behind the gate; that the gate was in clear view all that time; that when she saw it, she attempted to apply her brakes; was going about sixteen or seventeen miles an hour and the car slid; started to slide when about forty feet from the gate; struck the gate but not hard, car stopped where gate fastened on Peoria side of gate; after accident Koch was lying about four feet from where the gate would have closed about two feet from the curb and about six feet from her automobile and in path that car would have taken if it had gone on east; as soon as car stopped she got out and ran to Koch and a lady and a few others came up; that she didn't recall saying to an officer that she pushed both pedals to the floor but the car did not stop; didn't observe red flag in Koch's hand on top of gate; noticed something down at his side and later found it was a flag, but at time no flag was visible; heard him say after he had fallen "Someone wave

no flag was visible; heard him say after he had taken someone was something down at his side and later found it was a flag, but at time stop; didn't observe red flag in Koch's hand on top of gate; noticed officer that she pushed both pedals to the floor but the car did not a lady and a few others came up; that she didn't recall saying to go gone on east; as soon as car stopped the got out and ran to Koch and feet from her automobile and in path that car would have taken if it had the gate would have closed about two feet from the end and about six side of gate; after accident Koch was lying about four feet from where struck the gate but not hard, car stopped where gate landed on Peoria and the car slid; started to slide when crowd forty feet from the gate; to apply her brakes; was going about fifteen or seventeen miles an hour Gate was in clear view all that time; that when she saw it, she attempted but didn't observe Mr. Koch because he was behind the gate; that the at the time of impact; that she saw the gate move across the bridge gate was open about two or three feet when she struck it, got closed came in contact with the gate, Koch was not entirely across; that the him; that he must have been three feet out; that when her automobile the gate and had started across the bridge with the gate when she saw west of the first girder toward Peoria; that he was then at the end of saw Koch when at the crest of the first bridge about one hundred feet "Yes" which was in full view as she crossed on that day; that the first there was a sign on the right girder which said "Slow - Slippery When was there on that day in full view as she went over the bridge; that of the bridge; that Exhibit 3 is a stop sign shown on the picture which Peoria in an easterly direction; that there was a sign on the right side and was traveling when she crossed the bridge from Peoria to East travelling alone in the automobile; that it had rained that day that she had been to the City of Peoria, was in her car and was occurred shortly after the flood on the Peoria of August 1, 1938; permit the passage of boats on the river; that the boat in question

that flag to stop the boat;" that she then saw the flag; that she had  
to the  
proceeded on/bridge with several cars following but saw no cars ahead  
on south side of bridge; was looking ahead; heard no siren nor steam-  
boat whistle; saw no boat approaching from right or left; proceeded  
east on upgrade to top of jackknife bridge; at top level for a few  
feet and then eastward downgrade; was on right side of traffic lane;  
noticed gate starting to close with elderly gentleman handling it out  
at end of gate at latch and to left of center line of road about three  
quarters of the way over; noticed he was pulling gate forward and  
swung his hand with something that appeared to be a flag in it; there  
seemed to be a little color to it but was not unfurled; that she put  
on the brakes, the four wheels slid eastward toward gate coming on,  
but the man gradually got behind it; that the car continued to slide  
and the gate to come on; that she turned the car slightly to left to  
strike girder and avoid hitting gate, but was too late, so struck it.

On further cross examination, defendant stated that she knew  
it had been raining and bridge would be slippery; was in full view of  
east gate between seventy five and one hundred feet where gate latches  
when she reached top of grade; that she saw Koch when forty or forty  
five feet west of him, but did not see him one hundred feet away; that  
she applied the brakes but car continued sliding, when struck, about  
five miles per hour; that she did not sound the horn; that the gate  
was not solid, had spaces like lattice work you could see through; that  
it was possible it was her confusion that kept her from seeing Koch  
behind the gate; that she was watching her car; that she could not see  
from the crest of the bridge one hundred feet away; that the view from  
the crest to gate is clear and no obstruction to view in that one  
hundred feet, but she did not see Mr. Koch; that when she struck the  
gate, it eased back. It was within two or three feet of being closed  
when she hit it. She saw no one move her car from that location to a  
point one hundred feet east on south side of bridge. Mr. Koch was  
facing her when closing the gate, but when he got behind it, she did



not know whether or not he was facing her. After the accident there was a dirty red flag on the ground about six feet from the gate. Koch was lying along right curb four or five feet east of the first girder, and she observed no red lights on gate. It may be noted that material contradictions appear in the defendant's testimony.

Jesse Darling, of Eureka, testified to condition of the car.

Dudley Shepardson, of Tremont, aged eighteen, was present with his mother, Mrs. Shepardson, at time of collision. Other cars ahead of them. Saw collision and Koch on pavement. Took dark red flag rolled on stick and attempted to flag the boat. When first saw Mrs. Barker's car, it had stopped across roadway. He didn't see anyone move it. Next saw it on main span about one hundred feet to the east side, tight to curb. He heard no siren. Bridge was wet and oily. Oil or creosote on boards in addition to rain and was slick. Car ahead of me cut off view of Barker car. Did not see accident but heard boat whistle. Not know if red flag rolled up or if rolled up when thrown out of Koch's hand. Saw his head bleeding and something about his leg. Saw sign "Slow - Slippery When Wet." Car in front of me was a Model A Ford travelling about twenty five miles an hour. Went past place where Koch lay.

Edwin Mitchel testified that he lived in Pekin; measured gate; twenty eight feet from control house and five feet five inches above floor at curb on ends. Gate latches when closed. Curb at girder where gate latches when gate is closed is six and a half to seven inches high. Gate comes on top of curb. It is a latticed type metal gate. Framework made of three inch angle irons about a quarter of inch thick. Lattice is made of diagonal metal strips one and a fourth inches wide and a quarter inch thick. Travelled part of highway from hinged gate over to latched side practically even. Other witnesses testified to surrounding conditions corroborating in part testimony of respective parties.

From reading of the abstract and parts of the record, it appears that the questions of negligence and contributory negligence

not know whether it was a car or a truck. It was a light-colored car, and it was parked in front of the building. It was lying along the curb and it was facing the building. And the observer to the right of the car. It may be noted that material contradictions appear in the defendant's testimony.

Ludley, brother of the defendant, was a police officer. Mother, Mrs. Spence, was a police officer. Then, the collision was made of the car. On stick and attempted to turn right. The car was in the middle of the street. It had stopped across the street. He didn't see any one else. Next saw it on main street and saw it go to the right side, right to left. He heard no alarm. Nothing was seen and nothing. It was on the corner in addition to main street and right. The car was on the view of Barker car. The car was a light-colored car. Not know if red flag police or not. It was a light-colored car. Saw his head bleeding and he was lying on the ground. The flag "Slow - Slippery When Wet." The car was a light-colored car. Traveling about twenty-five miles an hour. The car was a light-colored car. Koch say.

There is a light-colored car in front of the building. Twenty-eight feet from control house and five feet from above floor at curb on right. Gate latch was closed. Gate at right side. Gate latch was gate is closed is six and a half feet from right. Gate closed on top of curb. It is a light-colored car. The car was made of three inch metal. It was a light-colored car. It was made of diamond metal strips and it was a light-colored car. Travelled from right side of the building. It was a light-colored car. It was a light-colored car. It was a light-colored car.

From reading of the account and facts of the record, it appears that the questions of negligence and contributory negligence



or want of due care at the time of the injury became questions of fact under the evidence. It appears that the plaintiff did not see the defendant's approaching car prior to the time of the collision, and this point is stressed strongly by defendant as such proof of contributory negligence on the part of the plaintiff as to preclude his recovery herein. We do not think so.

At the time that defendant's car skidded toward and into the gate which he was either in the act of closing or had just closed, plaintiff was behind the gate and was watching the latch. There is nothing in the evidence to show that he could have done anything to avoid being struck by the car as it crashed into the gate, whether he saw or did not see the defendant's car approaching or that there was anything that he could have done to avoid being struck at that time. On the other hand, defendant concedes that her view was open for one hundred feet after reaching the crest of the bridge with no obstructions ahead and that she could have seen him but did not see him until within about forty feet of the gate, when she says that she threw on the brakes and skidded into the gate which struck and injured the plaintiff, who was then behind the gate.

Defendant was familiar with this bridge and its operation; had frequently travelled it; knew of the wet condition of the bridge and was travelling in a manner as to not have control of her car. She seems not to have observed the flag, the man, the signals, the lights nor the gate nor to have heard either the siren or the boat whistle until she was so close to the gate as to be unable to stop her car at the speed she was travelling. Under the circumstances, we feel that there was ample evidence to justify the verdict of the jury both on the question of due care on the part of the plaintiff and of contributory negligence on the part of the defendant. We hold that under the evidence the Trial Court properly denied defendant's motions for directed verdicts and for judgment notwithstanding the verdict, and that under the motion for new trial, the verdict was not contrary to the manifest weight of

or west of the gate at the time of the collision. It is not  
under the evidence. It appears that the plaintiff did not see the  
defendant's approaching car prior to the time of the collision, and this  
point is stressed strongly by defendant as a basis for contributory  
negligence on the part of the plaintiff as to avoiding the collision  
herein. We do not think so.

At the time that defendant's car skidded down and into the  
gate which was either in the act of closing or had just closed,  
plaintiff was behind the gate and was looking the other way. There is  
nothing in the evidence to show that he could have seen anything  
avoid being struck by the car as it crossed into the gate, whether he  
saw or did not see the defendant's car approaching on that same way  
anything that he could have done to avoid being struck on that side.  
On the other hand, defendant concedes that her view was open for one  
hundred feet after reaching the crest of the bridge with no road sections  
ahead and that she could have seen him but did not see him until about  
about forty feet of the gate, when she says that she threw on the brakes  
and skidded into the gate which struck and injured the plaintiff, who  
was then behind the gate.

Defendant was familiar with this bridge and its operation;  
had frequently travelled it; knew of the fact of a fall on the bridge  
and was travelling in a manner as to not have control of her car. She  
seems not to have observed the flag, the sign, the signals, the lights  
nor the gate nor to have heard either the alarm or the horn whistle  
until she was as close to the gate as to be unable to stop her car at  
the speed she was travelling. Under the circumstances, we feel that  
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the question of the care on the part of the plaintiff and of contributory  
negligence on the part of the defendant. We hold that under the evidence  
the trial court properly found defendant's motion for directed verdict  
and for judgment notwithstanding the verdict, and that under the action  
for new trial, the verdict was not contrary to the manifest weight of

the evidence but was in accord with the greater weight of the evidence under the issues of fact herein.

Defendant alleged prejudicial error in admission of evidence and refusal of an instruction in relation thereto. On plaintiff's behalf, the bridge tender who succeeded him testified to finding the sheared bolt in which the gate latch was fitted lying some distance from the place of its severance on the following morning. Upon defendant's objection that conditions were not shown to be the same at the time this sheared bolt was found as at the time of the collision, the jury were instructed to disregard this testimony. Also, among the twenty four instructions given on behalf of the defendant, one specifically instructed the jury to disregard any testimony that had been stricken by the Court.

A further refused instruction singled out this particular bit of testimony and instructed the jury to disregard it, which instruction was properly refused. While it is not necessary to pass upon the admissibility of the particular testimony, it is clear that the direction to the jury to disregard it and the instruction to disregard all testimony which was stricken amply protected the rights of the defendant, and from a fair reading of the testimony and instructions in question, it does not appear that prejudice to the defendant could have resulted therefrom. We hold that there is no merit in defendant's contention that the refusal to give this instruction was prejudicial.

Certain argument, which we need not detail here, was made by counsel for plaintiff to which objection was made and sustained by the Court, and in other instances objection is raised to the Court's remark upon objection that "the jury heard the evidence and will be governed by the instructions of the Court." The case was closely contested and vigorously argued by respective counsel, but we find no prejudicial statements which in our judgment could have affected the verdict of the jury.



Respective parties have cited and have quoted from numerous decisions on the question of excessive damages for injuries of the nature which the plaintiff has suffered herein under varying circumstances. In some instances, damages equal in amount to those fixed by the jury were upheld under circumstances quite similar to those of the case at bar. In some instances under varying circumstances, remittiturs were required by the Court of Review as an alternative to granting a new trial, and in some cited cases, the amounts of such verdicts were found to be excessive and new trial was granted. In the instant case, the plaintiff, aged seventy one years, was shown to have an approximate ten year life expectancy by the only evidence in the record. His loss of wages for the time prior to the injury approximated \$1500 or \$1600; his physician's and hospital bills in excess of \$800. The proof justifies the conclusion that he has been and will be unable to work at his previous employment or in any other gainful employment; that prior to his injury, while in advanced years, he had enjoyed good health and suffered no injuries and was capable of satisfactorily performing the work in which he was engaged. From his injuries he sustained great physical pain, suffering and disability, which still remain and are of a permanent nature. The amount of the verdict in a given case is peculiarly a matter within the province of the jury when responsive to the testimony, and unless the finding of the jury is grossly excessive or reflects passion, prejudice or ulterior influences prejudicial to the defendant, a Court of Review should not disturb the finding of a jury and the judgment of the Trial Court based thereon. In this case, while the damages are very substantial, they were responsive to the evidence, and we cannot hold, as a matter of law, that any prejudice to the defendant is shown or reflected therein.

Finding no reversible error in the record, the judgment of the Circuit Court of Tazewell County will be affirmed.

JUDGMENT AFFIRMED.

THE COURT OF REVIEW OF THE RECORD, THE JUDGMENT OF THE CIRCUIT COURT OF HANCOCK COUNTY IS AFFIRMED.

JUDGMENT AFFIRMED.

Abstract

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

72

FEBRUARY  
October Term, A. D., 1941.

General No. 9315.

Agenda No. 17.

CARRIE M. CRAIG,  
HAZEL I. CRAIG,

Plaintiff Appellants,

-vs-

LEWIS G. COONROD, Receiver of  
the First National Bank of  
Urbana, Illinois, and DON D.  
RICHMOND,

Defendant Appellees.

Appeal from  
Circuit Court,  
Champaign County.

314 I.A. 379<sup>1</sup>

RIESS, J.:

Appeal herein was taken from a judgment in bar of suit and for costs entered in the Circuit Court of Champaign County in favor of defendant appellees, Lewis G. Coonrod, Receiver of the First National Bank of Urbana, Illinois, and Don D. Richmond and against plaintiffs Carrie M. Craig and Hazel I. Craig. Appellant Hazel I. Craig appeared pro se, and Carrie M. Craig, who joined with her in the notice of appeal and praecipe, failed to file or join in the abstract of record, assignments of error or briefs and argument of appellant, but her name is appended to appellants' reply brief.

The pleadings in the lower Court consisted of a second amended complaint and defendants' motion to dismiss same, which was granted. An attempt to appeal to this Court was made by plaintiffs after defendants' motion in the nature of a demurrer had been so sustained, but before a judgment or final appealable order was entered. The applicable rule is stated in Daab v. Ritter, 294 Ill. App. 203,





13 N. E. (2d) 636. This attempted appeal was dismissed by this Court upon defendants' motion in Gen. No. 9275 on February 20, 1941. Judgment in favor of defendant in bar of suit was then entered upon the pleadings in the lower court, followed by this appeal.

The second amended complaint consisted of eight counts wherein plaintiffs undertook to set up causes of action alleging damages to have been sustained by Carrie M. Craig as life tenant and owner of grain crops mentioned in the pleadings and by Hazel I. Craig as "remainderman", growing out of an alleged unlawful seizure and sale of crops under a garnishment writ previously procured in a Justice of the Peace Court by defendant Receiver and co-defendant Richmond, as his attorney, which action was alleged to have occurred in 1934, almost six years before the suit was filed.

It is difficult from the pleadings to ascertain the exact nature of the purported charges in the complaint. Reference is made to libel, slander and alleged unlawful action of defendants in the garnishment proceedings, which had terminated in favor of said Receiver as a judgment creditor and not of the plaintiff. A number of confused statements in the nature of conclusions are set forth in the pleadings and in the abstract, briefs and argument of appellant Hazel I. Craig, but from a careful examination thereof in the light most favorable to the plaintiff, it is evident that the lower court properly held that the amended complaint wholly failed to set forth necessary elements of a cause or causes of action upon which issues might be joined and litigated upon the merits by the defendants. While the Trial Court was liberal and considerate in its rulings in relation to the pleadings on account of the fact that the plaintiff appeared pro se, neither that Court nor this Court upon review of the record would be justified in holding that a cause of action was stated in the complaint. A complaint must contain sufficient averments to state a cause of action. No

13 W. 5. (1911) 100. This was a case where the plaintiff  
on a statement made by the defendant, and the defendant  
in fact is believed to have been the author of the statement.  
In the lower court, the plaintiff was held liable.  
The second question is whether the plaintiff was liable  
plaintiff's liability to the defendant of the plaintiff to have  
been established by the plaintiff. The plaintiff is liable  
proved mentioned in the statement, and the plaintiff is liable  
proving one of the alleged statements, and the plaintiff is liable  
payment with respect to the plaintiff of the plaintiff  
by defendant received the defendant's statement, as the attorney, which  
action was alleged to have occurred in 1905, almost six years before  
the suit was filed.  
It is difficult to see the plaintiff's liability to the defendant  
nature of the proposed action in the plaintiff. The plaintiff is liable  
to final, judgment and the plaintiff's action of defendant in the  
plaintiff's proceedings, which was terminated in favor of the plaintiff  
as a judgment procedure and not of the plaintiff. A number of cases  
established in the nature of proceedings are not found in the plaintiff  
and in the plaintiff, which are not found in the plaintiff's case.  
but from a careful examination of the plaintiff's case, it is found  
the plaintiff, it is evident that the plaintiff's case is not  
the plaintiff's case which failed to set forth necessary elements of  
a cause of action and which failed to show the plaintiff's liability  
liability upon the plaintiff by the defendant. The plaintiff's case  
was libelous and contained in the plaintiff's case, and the plaintiff  
on account of the fact that the plaintiff's case was not found  
Court not this Court, and the plaintiff's case was not found in  
holding that a cause of action was not found in the plaintiff's case.  
must contain sufficient elements to show a cause of action. No

facts tending to show fraud, malice or want of proper care are set forth in either the original or amended complaint or any count thereof.

The alleged errors assigned by Hazel I. Craig were that "the Court erred in rendering a verdict contrary to the evidence; the court erred in rendering a verdict contrary to the law" and that "the Court erred in entering a judgment for the defendants and against the plaintiffs" and asked that judgment be entered in this Court for the amount of the damages claimed in the complaint or that the judgment be reversed and cause remanded, and also asked for an order of this Court, if deemed "proper", that the Comptroller, presumably the United States Comptroller of Currency, be made a party to this suit. No trial nor verdict was had herein; the ruling of the lower court being solely upon the pleadings. The Comptroller was not made a defendant in the lower Court nor was any attempt by amendment of the complaint or prayer for process against the Comptroller sought in that Court. This Court, of course, would be powerless to enter any such order upon review herein. No further alleged errors were assigned.

No motion to dismiss the alleged appeal of Hazel I. Craig was made, and as the record now stands before us with no reversible error appearing therein, this Court can only affirm the judgment of the Trial Court.

Judgment in bar of suit against both plaintiff appellants and in favor of both defendant appellees as entered by the Circuit Court of Champaign County is therefore affirmed.

JUDGMENT AFFIRMED.

those tending to show fraud, which on part of person who was not  
found in either the original or amended complaint or any court record.

The alleged errors assigned by Hazel I. Craig were that

"the Court erred in rendering a verdict contrary to the evidence;

the Court erred in rendering a verdict contrary to the law; and that

"the Court erred in entering a judgment for the defendant and against

the plaintiff" and asked that judgment be entered in its favor for

the amount of the damages claimed in the complaint in that the judgment

be reversed and cause remanded, and also asked for an award of this

Court, it seemed "proper", that the Comptroller, presumably the United

States Comptroller of Currency, be made a party to this suit. No

final new verdict was had herein; the ruling of the lower court being

solely upon the findings. The Comptroller was not made a defendant

in the lower Court nor was any attempt by amendment of the complaint

or prayer for process against the Comptroller made in that Court.

This Court, of course, would be powerless to enter any such order

upon review herein. No further alleged errors were assigned.

No motion to dismiss the alleged appeal of Hazel I. Craig

was made, and as the record now stands before us with no reversible

error appearing therein, this Court can only affirm the judgment of

the Trial Court.

Judgment in sum of said appeal against both plaintiff and defendant

and in favor of both defendant appellants as entered by the Circuit

Court of Champaign County is therefore affirmed.

TESTIMONY AFFIRMED.

41918

JULIA GIBBONS,

Appellee,

v.

CITY OF CHICAGO, a Municipal corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

314 1A. 3790

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In a complaint filed in the Circuit Court of Cook County, Julia Gibbons sought to recover damages from the City of Chicago for personal injuries sustained by her as a result of a defect in a street. A trial before the court and a jury resulted in a verdict for plaintiff in the sum of \$4,000. Motions for a directed verdict and for a new trial were overruled and judgment was entered, to reverse which this appeal is prosecuted.

On July 25, 1938, at about 5:30 P. M., plaintiff, 77 years old, was walking in an easterly direction upon the south sidewalk of East 75th Street at and near its intersection with Exchange Avenue. 75th Street runs in an easterly and westerly direction, and Exchange Avenue runs in a northwesterly and southeasterly direction. The Illinois Central Railroad operates two sets of tracks, or four rails, in a northwesterly and southeasterly direction in the center of Exchange Avenue. This right of way divides the northbound and southbound vehicular traffic. The roadway to the west of the right of way, used by the southbound traffic, is 16 feet wide and paved with concrete. The roadway to the east of the right of way is used by the northbound traffic. There was a hole in the center of the west roadway at a point which would be in the center of the south sidewalk of 75th Street were it extended across the roadway. This hole was about 8 feet east of the west curb of the west roadway, and it was about 8 inches long, 6 inches wide and 6 inches deep. As plaintiff reached the west curb of the west roadway no vehicular traffic was going south. She walked in an easterly direction from the sidewalk onto the roadway. Several other pedestrians were crossing the west

JULIA SIMMONS

Officer

CITY OF CHICAGO, Municipal Corporation

Complaint

CHICAGO, ILL.

RECEIVED JULY 15 1935

In a complaint filed in the Circuit Court of Cook County,

Julia Simmons sought to recover damages from the City of Chicago

for personal injuries sustained by her as a result of a defect in

street, a trial before the court and a jury resulted in a verdict

for plaintiff in the sum of \$5,000. Verdict for plaintiff awarded

and for a new trial was overturned and judgment of \$5,000 for

reverse which this appeal is prosecuted.

On July 15, 1935, at about 1:30 p. m., plaintiff, 75 years

old, was walking in an easterly direction upon the south sidewalk of

East 75th Street at and near the intersection with Exchange Avenue.

75th Street runs in an easterly and westerly direction, and Exchange

Avenue runs in a northwesterly and southeasterly direction. The

Illinois Central Railroad operates two tracks at about 100 feet

in a northwesterly and southeasterly direction in the center of

Exchange Avenue. This right of way divides the neighborhood and south-

bound vehicular traffic. The roadway to the west of the right of way

used by the southbound traffic, is at least 100 feet wide with

concrete. The roadway to the east of the right of way is used by

the northbound traffic. There was a hole in the center of the road

roadway at a point which would be in the center of the south sidewalk

of 75th Street were it extended across the roadway. This hole was

about 3 feet east of the west curb of the east roadway, and it was

about 3 inches long, 3 inches wide and 3 inches deep. The plaintiff

reached the west curb of the east roadway at a point where the sidewalk

going south. She walked in an easterly direction from the sidewalk

into the roadway. Several other pedestrians were crossing the road

roadway at the same time. There is evidence that when plaintiff was about half way across the west roadway, an automobile traveling in a southeasterly direction approached from her left; that the motorist blew his horn, applied his brakes hurriedly, and came to a stop about 5 feet from plaintiff; that she noticed the car approaching and stepped back; and that in stepping back her heel went into the hole in the center of the street and she fell to the pavement. Two or three men picked her up and carried her to the office of a physician. She was then taken in an ambulance to a hospital, where X-ray pictures showed a fracture of the head of the femur. She remained in the hospital until May, 1939. Prior to the occurrence she was in good physical condition and had had no previous medical attention. At the time of the trial she was 80 years old. There was evidence tending to show an inch and a half shortening in the injured leg, that her heart was irregular, and that her pulse was quite rapid. She limped and was able to walk only with the aid of a cane.

The first point urged by defendant is that the burden was upon the plaintiff to prove that at and about the time and place of the accident she was in the exercise of due care for her own safety. Plaintiff recognizes that this is the law. She insists that the evidence shows that at the time and place of the accident she was in the exercise of due care for her own safety. The second point presented by defendant is that the evidence establishes as a matter of law that plaintiff did not exercise due care. The third and final point advanced by defendant is that the trial court should have directed a verdict for the defendant because of plaintiff's contributory negligence. Plaintiff answers these assertions by declaring that contributory negligence becomes a question of law only when the court can say that all reasonable minds must agree that the injury was the result of plaintiff's own negligence. Plaintiff asserts that the trial court properly refused to direct

roadway at the same place. There is evidence that when Plaintiff was about half way across the west roadway, an automobile traveling in a southeasterly direction approached from her left; that the motorist blew his horn, swerved his vehicle abruptly, and came to a stop about 5 feet from Plaintiff; that she noticed the car as it stopped and stepped back; and that in a fraction of a second she fell into the hole in the center of the street and she fell to the pavement. Two or three men rushed to her and carried her to the office of a physician. She was taken in an ambulance to a hospital, where X-ray pictures showed a fracture of the head of the femur. She remained in the hospital until May, 1939. Prior to the accident she was in good physical condition and had no previous medical attention. At the time of the trial she was 35 years old. There was evidence tending to show on linen and a belt, remaining in the injured leg, that her heart was irregular, and that her pulse was pulse rapid. She limped and was able to walk only with the aid of a cane. The first point argued by defendant is that the burden was upon the Plaintiff to prove that at and about the time and place of the accident she was in the exercise of due care for her own safety. Plaintiff recognizes that this is the law. She insists that the evidence shows that at the time and place of the accident she was in the exercise of due care for her own safety. The second point presented by defendant is that the evidence establishes as a matter of law that Plaintiff did not exercise due care. The third and final point advanced by defendant is that the trial court should have directed a verdict for the defendant because of Plaintiff's contributory negligence. Plaintiff answers these assertions by declaring that contributory negligence becomes a question of law only when the court can say that all reasonable minds must agree that the injury was the result of Plaintiff's own negligence. Plaintiff asserts that the trial court properly refused to direct



a verdict for the defendant as there was evidence of due care. From these statements of the respective contentions of the parties, it will be observed that the defendant concedes that there was competent evidence tending to establish that it was guilty of negligence. The only question presented for our consideration is whether the court erred in refusing to direct a verdict for the defendant. Defendant maintains that because of a complete absence of any evidence of the exercise of due care by the plaintiff, it was the duty of the trial court, as a proposition of law, to direct a verdict for the defendant.

We are of the opinion that a reading of the statement of facts shows clearly that plaintiff was in the exercise of due care for her own safety. She was walking in an easterly direction in common with other pedestrians proceeding in the same direction. She observed the automobile coming from the north and to avoid being struck by it, she stepped back. This action by a woman of her years clearly shows that she was cautious. The fact that plaintiff did not testify does not constitute any good reason for refusing judgment in her favor. The trial court was right in refusing to direct a verdict and in entering judgment. Therefore, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND KILEY, JJ. CONCUR.

a verdict for the defendant as there was evidence of the same. For these statements of the respective contentions of the parties, it will be observed that the defendant contends that there was competent evidence tending to establish that it was guilty of negligence. The only question presented for our consideration is whether the court erred in refusing to direct a verdict for the defendant. Defendant maintains that because of a complete absence of any evidence of the exercise of due care by the plaintiff, it was the duty of the trial court, as a protection of law, to direct a verdict for the defendant.

We are of the opinion that a finding of the absence of facts shows clearly that plaintiff was in the exercise of due care for her own safety. She was walking in an easterly direction in common with other pedestrians proceeding in the same direction. She observed the automobile coming from the north and to avoid being struck by it, she stepped back. This action by a woman of her years clearly shows that she was cautious. The fact that plaintiff did not testify does not constitute any good reason for refusing judgment in her favor. The trial court was right in refusing to direct a verdict and in entering judgment. Therefore, the judgment of the Circuit Court of Cook County is affirmed.

UNDEVELOPED

HERNIM AND KIRBY, JJ. CONCUR.

41931

LOUIS BOJARSKI,

Appellant,

v.

EVERETT G. BALLARD,

Appellee.

APPEAL FROM

SUPERIOR COURT

COCK COUNTY.

314 I.A. 380

MR. PRESIDING JUSTICE BUREL DELIVERED THE OPINION OF THE COURT.

On May 14, 1941, Louis Bojarski, filed his three count complaint in the Superior Court of Cook County for the recovery of the cost of \$8,000 worth of improvements, which Everett G. Ballard allegedly converted to his own use, and for damages based on malicious prosecution and abuse of process. A motion to dismiss filed by defendant, was sustained, and this appeal followed. The complaint, as summarized in plaintiff's brief, reads:

"Count 1. On February 10th, 1932, the defendant filed suit to recover \$5,000 for the first year's and \$1,500 for the second year's rental, on a lease from defendant as lessor and plaintiff as lessee commencing May 18, 1931. He also offered to cancel all claims for rent under the lease including rent represented by a \$500 note, in exchange for plaintiff's \$8,000 worth of improvements. Defendant assured plaintiff that he and his attorneys would take no further steps in the cause for rent then pending in LaPorte Superior Court as No. 9332. Plaintiff accepted defendant's offer. On the strength of this agreement defendant took and kept the improvements. On January 26, 1933, in violation of his agreement and without giving any notice to the plaintiff herein, or his counsel, Ballard secured a judgment by default, in cause No. 9332, of LaPorte Superior Court, for \$2,295.00, that is, \$500 for the first year's, \$1,500 for the second year's rent, and \$295 for attorney's fees. Ballard made no attempt to collect this secretly secured judgment until December 27, 1940, when through supplementary proceedings in Lake Superior Court sitting in Gary, Ind., cause No. 52929, he attached more than \$1,700 of the plaintiff's money in Calumet Title Company, Inc., and Calumet Securities Corp. On January 14, 1941 the plaintiff filed in LaPorte Superior Court, cause No. 13311, a complaint to set aside Ballard's judgment for rent and attorney's fees. On January 16, 1941, the Lake Superior Court of Gary, Ind. stayed Ballard's attachment proceedings pending disposal of cause No. 13311 in LaPorte Superior Court at Michigan City, Ind. The lease provides, 'If said Ballard sells the above land before the expiration of the lease he agrees to pay for the cost of construction of said cottages and parking station.' Its expiration date was December 21, 1935. Ballard sold the land on June 20, 1935, more than six months before the expiration of the lease but has failed and refused either to satisfy his wrongfully obtained judgment in cause No. 9332 or to pay 'the cost of construction of said cottages and parking station.' Plaintiff prays judgment for \$8,000, or in the alternative, a rule on Everett G. Ballard to satisfy the wrongfully and fraudulently obtained judgment.

JULY 1941

JULY 1941

V.

JULY 1941

JULY 1941

3141.4880

On May 14, 1941, Louis (Joseph), filed the above captioned

complaint in the Superior Court of Cook County for the recovery of

the sum of \$8,000 worth of improvements, which were made by

defendant, and for the balance of said improvements

prosecution and abuse of process. A motion to dismiss filed by

defendant, was sustained, and this appeal followed. The complaint,

as summarized in plaintiff's brief, reads:

"Count 1. On February 10th, 1938, the defendant filed suit to recover \$100 for the first year's rent and \$1,000 for the second year's rent, on a lease from defendant as lessor and plaintiff as lessee, commencing July 1st, 1937. He has offered in answer to all claims for rent under the lease including rent represented by a \$500 note, in exchange for plaintiff's \$8,000 worth of improvements. Defendant assured plaintiff that he would not take no further steps in the case for rent then pending in Chicago Superior Court as No. 9388. If plaintiff accepted defendant's offer, On the strength of this agreement defendant took and kept the improvements. On January 18, 1941, in violation of the agreement and without giving any notice to the plaintiff's counsel, or his counsel, plaintiff secured a judgment by default, in case No. 9388, of late Superior Court for \$8,825.00, and is, \$500 for the first year's rent, \$1,500 for the second year's rent, and \$500 for attorney's fees. Plaintiff made no attempt to collect this allegedly secured judgment until December 27, 1940, when plaintiff unilaterally proceeded in Lake Superior Court filing in early, ind., case No. 9389, he attached more than \$1,700 of the plaintiff's money in Calumet Title Company, Inc., and Calumet Securities Corp., on January 14, 1941 the plaintiff filed in Superior Court, case No. 10311, a complaint to set aside plaintiff's judgment for rent and attorney's fees. On January 18, 1941, the Lake Superior Court of Early, Ind., stayed plaintiff's attachment proceeding pending disposal of case No. 10311 in Lake Superior Court at Chicago City, Ind. The case provides, 'It shall remain to be determined before the expiration of the lease he agreed to pay for the cost of construction of said cottages and parking station, for the expiration date was December 31, 1938. Plaintiff sold the lot on June 30, 1938, more than six months before the expiration of the lease but has failed and refused either to satisfy his wrongful obtained judgment in case No. 9388 or to pay 'the cost of construction of said cottages and parking station'. Plaintiff says judgment for \$8,000, or in the alternative, a rule on verdict. Plaintiff to satisfy the wrongfully and fraudulently obtained judgment.

"Count 2. Plaintiff realleges all material facts contained in Count 1. On February 7, 1941, defendant maliciously and with intent to harm, ruin and compel the plaintiff herein to pay him large sums of money to which said Ballard was not entitled, did file in Lake Superior Court sitting in Hammond, Ind., not one but four supplementary suits against the plaintiff herein and persons holding funds belonging to him, attaching large sums of money belonging to the plaintiff herein seriously hampering his business and affecting his standing with his customers and the community. The plaintiff herein has been compelled to spend large sums of money in defending such suits; that said acts and doings of Everett G. Ballard amount to malicious prosecution.

"Count 3. Plaintiff realleges each and every factual allegation contained in Counts 1 and 2, and for a further cause of action states that the number of supplemental suits filed by Everett G. Ballard also constitutes malicious abuse of process."

Plaintiff's theory is that he has a right to recover the cost of the improvements "because [Count 1] the defendant converted them to his own use when he secured a judgment for \$2,295 after misleading the plaintiff herein into believing that the improvements were accepted in full payment of all claims under the lease; or because Ballard promised to pay for said improvements if he sold the land before December 31, 1936, and he sold it six months before that date; [Count 2] defendant must respond in damages for malicious prosecution for attaching more than \$1,700 of the plaintiff's funds through cause No. 32296 at Gary, Indiana, but especially because three weeks after the Lake Superior Court of Gary, Ind. stayed defendant's attachment proceedings pending disposition of the suit to set aside the judgment for rent, Ballard saw fit to file four more attachment suits in Lake Superior Court at Hammond, Indiana; [Count 3] defendant must respond to plaintiff in damages because the number of attachment suits filed by him constitutes abuse of process." Defendant's theory, as stated by plaintiff, is that "the complaint is a collateral attack on a judgment of a sister State. There is another action pending between the parties hereto for the same cause. Plaintiff's action is barred by the Statute of Limitations. Plaintiff was negligent throughout the transactions stated in the complaint."

The first point advanced by plaintiff is that any unauthorized act by which an owner is deprived of his property permanently



or indefinitely, or the exercise or dominion over property, inconsistent with the rights of the owners, is a conversion. He also argues that a party has a cause of action against another who maliciously and without probable cause institutes a succession of suits against him, and that an abuse of process exists where a party employs such process for some unlawful purpose which it was not intended by the law to effect. He states that the term "abuse of process" means the perversion or accomplishment of some illegal object for which such process was not legally intended. He insists that defendant's motion to strike is without merit and that "a complaint which on its face states a good cause of action cannot be finally disposed of on motion to dismiss, as any formal defect may be cured by amendment." Defendant meets these arguments by asserting that the judgment in cause No. 9332 in the Superior Court of LaPorte County, Indiana, rendered January 26, 1933, in favor of defendant in the instant case, precludes the maintenance of the present action; that such judgment is res judicata of all questions properly involved in the suit in which it was rendered, including the question whether the parties had by contract compromised the subject matter of that suit; and that judgment of a sister State cannot be collaterally attacked by a proceeding in a court of this State, even upon a charge of fraud in obtaining it. We agree that the judgment in cause No. 9332 in the Superior Court of LaPorte County, Indiana, which has not been modified or vacated, is res judicata as to the cause of action asserted, and that such judgment cannot be collaterally attacked. We also agree that the complaint in the instant case does not afford any basis for attacking such judgment.

Defendant maintains that the complaint does not state a cause of action for malicious prosecution or abuse of process; that there is no showing of malice or want of probable cause; that the only concluded litigation between the parties was resolved in favor of defendant and that the process described in the complaint





is for the purpose of enforcing defendant's previously obtained judgment. The complaint shows that the litigation has not terminated in favor of the plaintiff, or that the defendant is acting without probable cause in endeavoring to collect his judgment. We assume that the action of the Superior Court of La Porte County in entering the judgment on January 26, 1933, was proper. The attachment suits thereafter commenced were for the purpose of collecting such judgment. Clearly, no cause of action can be maintained against the defendant because he did that which he had a right to do. We also assume that the courts of Indiana will decide the causes according to the law and the evidence, and that if plaintiff herein is right in his contentions, he will prevail. We agree with defendant that plaintiff was not prevented from amending his complaint. He made no motion to amend, nor did he present any proposed amendment so that the trial court could determine what such amendment would be.

Defendant argues other points. As we have arrived at the conclusion that the court was right in dismissing the complaint, it is unnecessary to extend this opinion by discussing such points, some of which are being litigated in the Indiana courts. Because of the views expressed, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND KILEY, JJ. CONCUR.

is for the purpose of enforcing the provisions of the  
judgment. The court in this case has not been asked  
in favor of the plaintiff, on that the defendant is acting without  
probable cause in endeavoring to collect his judgment. It is true  
that the action of the Circuit Court of Cook County in entering  
the judgment on January 25, 1903, was proper. The defendant admits  
that the defendant was not the owner of the property when judgment  
was entered. Clearly, no cause of action can be maintained against the defendant  
because he did that which he had a right to do. It is also true that  
the courts of Indiana will decide the issues according to the law  
and the evidence, and that if plaintiff herein is right in his  
contentions, he will prevail. He agrees with defendant that plain-  
tiff was not prevented from amending his complaint. He made no  
motion to amend, nor did he present any proposed amendment so that  
the trial court could determine what such amendment would be.  
Defendant agrees that he has not been prevented from  
the conclusion that the court was right in dismissing the complaint.  
It is unnecessary to extend this opinion by discussing each point,  
some of which are being litigated in the Indiana courts. Because  
of the above exposed, the judgment of the Circuit Court of  
Cook County is affirmed.

JUDGMENT OF THE COURT.

REVEREND AND HONORABLE, J. J. COCHRAN.

41848

HENRY ROKICKI, a minor, by JOSEPH ROKICKI,  
his father and next friend,

Plaintiff - Appellant,

v.

POLISH NATIONAL ALLIANCE OF THE UNITED  
STATES OF NORTH AMERICA, a corporation,

Defendant - Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

3141A.380<sup>2</sup>

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

This is a suit instituted on behalf of Henry Rokicki, a minor, by Joseph Rokicki, his father and next friend against the defendant corporation, which was the owner of premises upon which the plaintiff was injured. The defendant denied the allegations of negligence and attractive nuisance alleged in plaintiff's complaint. A trial was had before a Judge and a jury in the Circuit Court of Cook County, and the jury returned a verdict finding the defendant guilty and assessing plaintiff's damages in the sum of \$3,500. Thereafter, the trial court sustained defendant's motion for a directed verdict at the close of all the evidence and entered judgment for defendant notwithstanding the verdict of the jury, from which action this appeal is taken.

The facts of this case, as called to the attention of this court by plaintiff's statement, are that the defendant, Polish National Alliance of the United States of North America, owned and operated a building at 3519 Belmont Avenue, Chicago; that it was a two-story frame house with a back yard, in which was a shed and garage; that adjacent to the premises at 3519 Belmont and west of it, there was a playhouse on an otherwise empty lot; that children used to play on the playhouse lot, some playing baseball; and children of tender years, playing such games as "It", "I got it", "Tag", and "Cops and Robbers"; that the house at 3519 Belmont Avenue was in an apparently dilapidated condition; that the foundation settled on the east side of the house;

HENRY TOKIOKI, a minor, by JOSEPH TOKIOKI, his father and next friend,

Plaintiff - Defendant,

v.

ALLIANCE OF THE UNITED STATES OF NORTH AMERICA, a corporation,

Defendant - Plaintiff.

81-2-1-880

NO JUSTICE SHALL BE DONE TO THE WIDOW OF THE DECEASED

This is a suit instituted on behalf of Henry Tokioki, a

minor, by Joseph Tokioki, his father and next friend, against the

defendant corporation, which was the owner of premises upon which

the plaintiff was injured. The defendant failed in its obligation of

negligence and attractive nuisance alleged in plaintiff's complaint.

A trial was had before a Judge and a jury in the Circuit Court of

Cook County, and the jury returned a verdict finding the defendant

guilty and assessing plaintiff's damages in the sum of \$5,000.

Thereafter, the trial court sustained defendant's motion for a directed

verdict at the close of all the evidence and entered judgment for

defendant notwithstanding the verdict of the jury, from which action

this appeal is taken.

The facts of this case, as called to the attention of this

court by plaintiff's statement, are that the defendant, Alliance of the

Alliance of the United States of North America, owned and operated

a building at 5512 Belmont Avenue, Chicago; that it was a two-story

frame house with a back yard, in which was a shed and garage; that

adjacent to the premises at 5512 Belmont and west of it, there was a

playhouse on an otherwise empty lot; that children used to play on

the playhouse lot, some playing baseball; and children of tender years,

playing such games as "it", "I got it", "tag", and "cops and robbers";

that the house at 5512 Belmont Avenue was in an extremely dilapidated

condition; that the foundation settled on the east side of the house;

that there was no fence between the back yard of that house and the lot on which the playhouse was located, where the children used to play. In the operation of its real estate holdings in Chicago, the defendant maintained its own maintenance department, employing from ten to fifty people at a time to do the repair work on the properties owned by it. One Stanley R. Jalczynski was employed by defendant as a foreman, supervising the men doing various maintenance and repair work on the various buildings owned by it; that he and the men working under him were paid by the defendant and received their orders on all jobs from the real estate department in the main office of the defendant.

In September, 1935, and for sometime prior to the accident herein involved, workmen under the charge of Stanley R. Jalczynski, their foreman, were doing repair work on the house at 3519 Belmont Avenue. The house was settling and they were digging to put a new foundation on the east side. They had been excavating for four weeks, had brought and poured concrete, and were building up some shoring for the cement foundation. Three-fourths of the foundation on the east side of the house was repaired and about three-fourths of new siding was put in.

In the process of excavating, the ground that was dug out, was carried and piled up in mounds, partly in the back yard on the west side of the lot on which the house stood, and partly on the empty lot where the playhouse was located. These mounds were in some places as high as three feet. Also, there were heaps or mounds of ground in the center of the back yard, some as high as three feet, with glass, cans, pieces of wood and other debris mixed with the earth. There was no fence between the back yard of the house and the vacant lot where the playhouse was located and where the children used to play.

On September 12, 1935, the day of the accident, the reconstruction work was not finished and was left unguarded. The mounds

that there was no fence between the back yard of the house and the lot on which the Alphonse was located, where the children used to play. In the operation of the real estate business in Chicago, he maintained his own maintenance department, employing from ten to fifty people at a time to do the repair work on the properties owned by it. One Stanley J. Jalcynski was employed as a foreman, supervising the men doing various maintenance and repair work on the various buildings owned by it; in 1935 and the year ending under him were said by the defendant and received that certain on all jobs from the real estate department in the main office of the defendant.

In September, 1935, and for sometime prior to the accident herein involved, workmen under the charge of Stanley J. Jalcynski, their foreman, were doing repair work on the house at 1810 Belmont Avenue. The house was settling and they were digging to put a new foundation on the west side. They had been excavating for four weeks, had brought and poured concrete, and were waiting for some shoring for the cement foundation. Three-fourths of the foundation on the east side of the house was repaired and about three-fourths of new siding was put in.

In the process of excavating, the ground had been dug out, was carried and piled up in mounds, partly in the back yard on the west side of the lot on which the house stood, and partly on the empty lot where the Alphonse was located. These mounds were in some places as high as three feet. Also, there were mounds of ground in the center of the back yard, some as high as three feet, with glass, cans, pieces of wood and other debris mixed with the earth. There was no fence between the back yard of the house and the vacant lot where the Alphonse was located and where the children used to play.

On September 13, 1935, the day of the accident, the reconstruction work was not finished and was left unguarded. The mound

or heaps were visible from the public alley and the vacant lot where the children's playhouse was located. The plaintiff, a boy five years and nine months old, was on the playhouse lot riding on a tricycle, saw the mounds or heaps of ground in the back yard of the house in question and, as he testified at the trial, he wanted to go up and down the hills and for that purpose went to the yard on his tricycle. He went up a hill and as he did, the ground slid under him and he fell, cutting his right wrist either by the tin cans or the glass which were mixed in the heap of ground. He was immediately taken to the Belmont Hospital for first aid, and on the same day was transferred to the St. Mary's Hospital where Dr. A. Warszewski performed an operation. The medical examination disclosed that there was a wide laceration across the wrist, the cut extending from the skin to the bone and severing practically all of the soft tissue in the wrist. The cut was through the tendon and nerve that controlled the flexing of the wrist. All the flexor tendons were cut through to the bone. An operation was performed on his wrist, during the course of which the tendons were sutured, and the subcutaneous tissue was brought together and a cast was applied. He remained in St. Mary's Hospital for a week. Afterward, the attending surgeon visited the boy for a period of five months, first daily and then two or three times a week after that. He was given physiotherapy treatments for about five months which brought about considerable improvement. The last time that the attending surgeon examined the boy, was two years before the trial. He found inability to extend the wrist and keep it in a flexed condition. In his opinion, the condition of the wrist, as he saw it then, was permanent. Thereafter, Dr. Joseph F. Korecki, who first saw the plaintiff in 1937, treated the child in an attempt to improve the condition of the wrist, and performed several tests which disclosed impairment or weakening of the flexor of the right wrist. Dr. Korecki examined the boy on the day of the trial and found an increase in the deficiency of the right forearm, wrist and hand. It was his opinion

or hands were visible from the side of the body. The child's playthings were located, the child's, a boy five years and nine months old, was on the left side of the body. The new the wounds on back of hand in the case of the child in question and, as he testified at the trial, he stated that he had down the child and for that purpose went to the yard on the left. He went up a hill and as he did, the ground was under him and he fell, cutting his right wrist about the time he came to the place where were fixed in the back of ground. He was immediately taken to the Belmont Hospital for first aid, and on the way he was accompanied to the St. Mary's Hospital where he was operated on. The medical examination disclosed that there was a wide incision across the wrist, the cut extending from the skin to the bone and severing practically all of the soft tissue in the wrist. The cut was through the tendon and nerve that controlled the flexing of the wrist. All the flexor tendons were cut through to the bone. An operation was performed on his wrist, during the course of which the tendons were sutured, and the subsequent treatment was given at Belmont and a cast was applied. He remained in St. Mary's Hospital for a week. Afterward, the attending surgeon visited him for a period of five months, first daily and then two or three times a week after that. He was given physiotherapy treatments for about five months which brought about considerable improvement. The last time that the attending surgeon examined the boy, was two years before the trial. He found inability to extend the wrist and keep it in a flexed condition. In his opinion, the condition of the wrist, as he saw it then, was permanent. Thereafter, Dr. Joseph L. Forester, who first saw the child in 1917, treated the child in an attempt to improve the condition of the wrist, and performed several tests which disclosed impairment or weakening of the flexor of the right wrist. Dr. Forester examined the boy on the day of the trial and found an increase in the deficiency of the right forearm, wrist and hand. It was his opinion



that the condition of mobility was permanent.

Plaintiff contends that when the trial court directed a verdict for the defendant at the close of all the evidence and entered judgment for the defendant notwithstanding the verdict of the jury, such action was tantamount to a holding as a matter of law that no attractive nuisance was present, and that there was no negligence on the part of the defendant or its agents upon which the verdict could be based - that the plaintiff's injury was damnum absque injuria. Upon the question as presented here, the plaintiff's evidence and testimony of witness must be viewed in the light most favorable to plaintiff and be given the benefit of all reasonable inferences and intendments. (Cooper v. Safeway Lines, 304 Ill. App. 302). It is urged by plaintiff that it should readily become apparent from a resume of the salient factors of the testimony that the trial Judge erred in holding as he did. That the childish mind is attracted and its curiosity aroused by the presence of some novel situation and entertainment, cannot be doubted. Plaintiff contends that the record discloses that the condition which existed on the premises in question was one calculated to intrigue the infantile mind of plaintiff and to attract him to the premises for his own pleasures; and that the fact that other children had been using the hills to coast down on wagons and bicycles, alone would seem to be conclusive of the factors of attraction, and notice to defendant of existing conditions. Plaintiff points to the three feet high hills of dirt, littered with glass, tin cans, etc., created by defendant's agents, with no guard rail or other warning device placed around these "dump" piles, although they were open to the view of the children playing nearby; that there was no fence between the back yard of the premises in question and the vacant lot immediately adjacent to it, which back yard and vacant lot the children had for some time been using daily as a playground for their various games.

that the condition of mobility was permanent.

Plaintiff contends that when the trial court rendered a

verdict for the defendant at the close of all the evidence and after

judgment for the defendant notwithstanding the verdict of the jury,

such action was tantamount to a ruling as a matter of law that no

attractive nuisance was present, and that there was no negligence on

the part of the defendant on the ground upon which the verdict could

be based - that the plaintiff's injury was caused by the defendant's

Upon the question as presented here, the plaintiff's evidence and

testimony of witnesses must be viewed in the light most favorable to

plaintiff and be given the benefit of all reasonable inferences and

inferences. (Gordon v. Helway, 102 Ill. App. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

urged by plaintiff that it should readily become apparent from a

review of the salient factors of the testimony that the trial judge

erred in holding as he did. That the child's mind is susceptible and

its susceptibility aroused by the presence of some novel situation and

entertainment, cannot be doubted. Plaintiff contends that the record

discloses that the condition which existed on the premises in question

was one calculated to intrigue the infantile mind of plaintiff and

to attract him to the premises for his own pleasure; and that the

fact that other children had been using the rifle to shoot down on

vases and bicycles, alone would tend to be conclusive of the

factors of attraction, and notice to defendant of existing conditions.

Plaintiff points to the three test high hills of dirt, littered with

glass, tin cans, etc., erected by defendant's agents, with no guard

rail or other warning device placed around these "dug" holes,

although they were open to the view of the children playing nearby;

that there was no fence between the back yard of the premises in

question and the vacant lot immediately adjacent to it, which back

yard was vacant for the children had for some time been using daily

as a playground for their various games.

The answer of defendant to plaintiff's contention is that the court did not err in sustaining defendant's motion for a directed verdict at the close of all the evidence, but that the court should have sustained defendant's motion for directed verdict at the close of plaintiff's evidence, and that the entry of judgment notwithstanding the verdict was not error. Defendant urges that plaintiff's evidence tends to show that the proximate cause of his injury was the fall from the tricycle on which he was riding; that his proof is silent, however, concerning the size of the tricycle, whether it was large or small, whether it was of such a size as could be safely ridden by plaintiff, and whether it was in such state of repair that it could be ridden safely. Nor was there any proof, it is urged, that plaintiff had had any experience in riding tricycles, or that his experience had been sufficient to enable him to ride down piles of dirt such as those in question with safety; that the evidence concerning the presence and location of tin cans and glass was very meagre. The plaintiff testified that there were only several tin cans but that he saw a lot of glass. He could not remember if there were tin cans on the piles of dirt. His brother testified that there were many tin cans and some glass in the back yard, and that there was glass from broken bottles.

The question, therefore, is largely one of fact, and the facts here before the court must be considered to determine whether plaintiff was entitled to recover on the theory that defendant maintained an attractive nuisance. The question is, of course, as to whether the doctrine of attractive nuisance is to be applied. In Burns v. City of Chicago, 338 Ill. 89, one of the cases cited, the court in discussing the conditions under which the doctrine of attractive nuisance can be invoked, quotes with approval from the case of Follett v. Illinois Central Railroad Co., 288 Ill. 508, where the court said;

"The cases fall into two classes: First, where the injury results from some dangerous element a part of or inseparably connected with the alluring thing or device, as in the turntable

the answer of defendant to plaintiff's contention is that the court did not err in sustaining defendant's motion for a directed verdict at the close of all the evidence, but that the court should have sustained defendant's motion for directed verdict at the close of plaintiff's evidence, and that the theory of judgment notwithstanding the verdict was not error. Defendant argues that plaintiff's evidence tends to show that the proximate cause of his injury was the fall from the trolley on which he was riding; that his proof is direct, however, concerning the state of the trolley, whether it was a factor or small, whether it was of such a size as could be safely ridden by plaintiff, and whether it was in such state of repair that it could be ridden safely. Now as there any proof, it is direct, that plaintiff had had any experience in riding trolleys, or that his experience had been sufficient to enable him to ride down steps of dirt such as those in question with safety; that the evidence concerning the presence and location of tin cans and glass was very meagre. The plaintiff testified that there were only several tin cans but that he saw a lot of glass. He could not remember if there were tin cans on the side of dirt. His brother testified that there were many tin cans and some glass in the back yard, and that there was glass from broken bottles.

The question, therefore, is largely one of fact, and the facts here before the court must be considered to determine whether plaintiff was entitled to recover on the theory that defendant maintained an attractive nuisance. The question is, of course, as to whether the doctrine of attractive nuisance is to be applied. In Dunn v. City of Chicago, 338 Ill. 50, one of the cases cited, the court in discussing the conditions under which the doctrine of attractive nuisance can be invoked, quoted with approval from the case of Hollett v. Illinois Central Railroad Co., 338 Ill. 506, where the court said:

"The cases fall into two classes: First, where the injury results from some dangerous element a part of or inseparably connected with the thing or place, as in the turntable

cases, where children may be killed or injured while playing with the thing on account of its dangerous nature; second, where the attractive device or thing is so located or situated that in yielding to its allurements the child, without such intervention of another element as breaks the relation of cause and effect, is brought directly in contact with danger from some independent source which occasions the injury."

The plaintiff suggests, however, that construing the plaintiff's testimony and that of his witnesses, even without enhancing it by lending to such testimony the benefit of all inferences and intendments, we have here a number of hills of dirt approximately three feet high, littered with glass, tin cans and rubbish, which were created by defendant's agents in excavating and rebuilding in the process of raising up the foundation of the building on the premises for approximately three-fourths of its length. No guard rail or other warning device had been placed around these "dump" piles, although they were open to the view of children playing nearby. There was no fence between the back yard of the premises in question and the vacant lot adjacent thereto, which for some time many children had been using as a playground. The children had been in the habit of playing there daily, and from that playground could view the back yard of the premises in question.

The doctrine of attractive nuisance requires that the attraction be visible from a public place or a place where children have a right to be. Plaintiff contends that it was shown by the testimony of Stanley Jalczynski, who was employed by defendant for the purpose of supervising the repair work on the premises, that such work had commenced sometime in July or August of 1935, and by the testimony of others that for some time children had been using the hills as a medium for entertainment. It is urged that the presence alone of the children on the lot next door and in the playhouse on that lot was sufficient notice to defendant of such presence and their proximity to the dangers existing in the back yard at 3519 Belmont, and the case of Ramsay v. Tuthill Material Company, 295 Ill. 395, pointed to. In that case defendant maintained on its premises an elevated switch track beneath which were bins constructed in the trestle-work for

cases, where children may be killed or injured by the thing on account of its dangerous nature, where the attractive device or thing is so located or placed as to bring to the attention of the child, without such intervention of another element as breaks the relation of cause and effect, is usually in contact with danger from some independent source which constitutes the injury."

The plaintiff's expert, however, in his testimony, testified that of his witness, even without introduction of any leading to such testimony the result of his inspection and investigation, we have here a number of holes or pits or depressions in the sidewalk, located with glass, tin cans and rubbish, which were created by defendant's agents in excavating and remodeling in the process of raising up the foundation of the building on the premises for a certain number of three-fourths of the length. No guard rails or other warning devices had been placed around these "holes" or pits, although they were open to the view of children playing nearby. There was no fence between the back yard of the premises in question and the vacant lot adjacent thereto, which for some time many children had been using as a play-ground. The children had been in the habit of playing there freely, and from that playground could view the back yard of the premises in question.

The doctrine of attractive nuisance requires that the attraction be visible from a public place or a place where children have a right to be. Plaintiff contends that it was shown by the testimony of Stanley Jankowski, who was employed by defendant for the purpose of supervising the repair work on the premises, that such work had commenced sometime in July or August of 1935, and by the testimony of others that for some time children had been using the site as a medium for entertainment. It is urged that the presence alone of the children on the lot next door and in the playground on that lot was sufficient notice to defendant of such presence and their proximity to the dangers existing in the back yard at 3512 Belmont, and the case of Amey v. Tenth National Bank, 295 Ill. 122, pointed to. In that case defendant maintained on its premises an elevated switch track beneath which were also constructed in the track-work for

the purpose of holding sand. The bottom of the bins were about eight feet above the ground, and were reached by a ladder. The deceased, ten years of age, came onto the premises, climbed the ladder and when he was playing in the sand, slid into an opening in the bottom of the bin and was smothered to death. The court there said;

"It is not necessary, to make a defendant liable, that the attractive and dangerous thing should be visible from the street and that children should have been attracted to the premises by it. If an owner maintains dangerous conditions upon his premises to which he permits children to come he must use ordinary care to guard them against danger which their youth and ignorance prevent them from appreciating. There is no implied invitation from the mere existence of a dangerous attraction which is not discoverable off the premises, but if to the knowledge of the owner children habitually come upon his premises where a dangerous condition exists to which they are exposed, the duty to exercise care for their safety arises, not because of an implied invitation but because of his knowledge of unconscious exposure to danger which the children do not realize."

The Ramsey case was cited and approved by this court in Cicero State Bank v. Dolese and Shepard Co. 298 Ill. App. 290. See also Wolczek v. Public Service Co., 342 Ill. 482.

The question as to whether the plaintiff sustained an injury on the premises in question and in determining whether or not the doctrine of attractive nuisance will be applied and the defendant held liable, the Hurns case (supra) is again called to our attention by defendant. There the Supreme Court said;

"To say that whenever the claim is made that an injury to children engaged in play has been occasioned by a dangerous agency the case must always be submitted to the jury to determine whether there was an element of attractiveness present is going too far. The situation has been aptly expressed in a recent Minnesota case, in which the court said: 'To the irrepressible spirit of curiosity and intermeddling of the average boy there is no limit to the objects which can be made attractive playthings. In the exercise of his youthful ingenuity he can make a plaything out of almost anything and then so use it as to expose himself to danger. If all this is to be charged to natural childish instincts and the owners of property are to be required to anticipate and guard against it, the result would be that it would be unsafe for a man to own property, and the duty of the protection of children would be charged upon every member of the community except the parents of the children themselves.' Erickson v. Minneapolis St. Paul & Sault Ste. Marie Railroad Co., 165 Minn. 106, 205 N. W. 889."

The plaintiff in this action contends that the attractive nuisance charge, when proved, is but a circumstance bearing upon the question of the negligence of the defendant, and proof of the existence





of an attractive nuisance is not a prerequisite to recovery. That under the pleading of this case, it was merely necessary to make out a case of negligence against the defendant, and the question of whether or not the defendant was guilty of negligence was for the jury to determine, and cites Flis v. City of Chicago, 247 Ill. App. 128, wherein this court said:

"The plaintiff had the right to allege in his declaration as many grounds of recovery as he saw proper, but it was not necessary that he prove all of these. If he proved enough of the acts of negligence charged to make out a case it was sufficient. (Seber Wagon Co. v. Kehl, 139 Ill. 644, 666; Devine v. Delano, 272 Ill. 166; Wood v. Illinois Central R. Co., 185 Ill. App. 180, 184; Reivitz v. Chicago Rapid Transit Co., 327 Ill. 207, 209). Plaintiff's intestate was only five years of age at the time of the accident and was therefore incapable of such conduct as would constitute contributory negligence. (Maskaliunas v. Chicago & N. W. R. Co., 316 Ill. 142, 149) and he was not a trespasser (Deming v. City of Chicago, supra; Stedwell v. City of Chicago, supra.); and in our judgment, even if it be held that the kettle did not constitute an attractive nuisance, nevertheless, under the pleadings and the evidence in the case, the plaintiff made out a clear case of negligence against the defendant. The attractive nuisance charge, if proved, would be but a circumstance bearing upon the question of the alleged negligence of the defendant."

The defendant, in reply to plaintiff's contention, vigorously contends that the plaintiff's case was tried on the theory of attractive nuisance only, and urges that the complaint was drawn wholly on that theory. It is elementary as suggested that plaintiff can recover only on proof of the charges laid in his complaint. (Brodsky v. Frank, 342 Ill. 110; Hennett v. Ill. Power & Light Corp., 355 Ill. 564.) In the Frank case the Court said;

"A plaintiff must prove the case alleged in his declaration. He can recover only on the allegations of the declaration and not on a case not alleged, even though such a case is established by the evidence. A defendant has a right to know what the charges are, in order to properly make a defense and to prevent his being taken by surprise by evidence on the trial (Feder v. Midland Casualty Co., 316 Ill. 562)."

It is further suggested in support of the defendant's reply that it is elementary that a party cannot try a case on one theory in the trial court and on another theory in the court of review. (Chicago Title & Trust Co. v. DeLassux, 336 Ill. 522). It does appear from the facts as presented that the occurrence complained of took



place on the premises alleged to have been owned by defendant. It is not alleged in plaintiff's complaint, nor is there evidence in the record which discloses that the plaintiff was on the premises in question at the invitation, express or implied, of the defendant. It does not appear from anything said in plaintiff's brief that the presence of plaintiff was not that of a trespasser. Under the facts as they appear in the record, the defendant was under no obligation to keep the premises in any particular state or condition to promote plaintiff's safety, and, as was said in McDermott v. Burke, 256 Ill. 401;

"It is an unquestioned general rule that the owner or occupier of private grounds is under no obligation to keep them in any particular state or condition to promote the safety of trespassers, intruders, idlers, bare licensees, or others who come upon them without any invitation; either express or implied; and this general rule applies equally to adults and children."

The plaintiff being a trespasser, the defendant owed him no duty not to pile the excavated dirt in the back yard of the premises in question. As suggested, the only persons who could complain of piling the dirt there were the tenants who were in possession and control of the premises. But they are not complaining. As was said in Campion v. Chicago Landscape Co., 295 Ill. App. 225, "It is a fundamental principle in our law that negligence is a breach of duty and where there is no duty or breach there can be no negligence." Defendant criticizes the cases of Ellis v. City of Chicago, and Costello v. City of Aurora, 295 Ill. App. 510, and points out that they lay down no different rule. It does appear that in the Ellis case the tar kettle or boiler was being operated by defendant in a public street, a place where plaintiff's intestate had a right to be. Since he was not a trespasser, the defendant owed him a duty to exercise ordinary care for his safety. In the Costello case, the plaintiff's hand was injured by a Cannon ball falling from a pyramid of concrete which was maintained by defendant in one of its public parks, where the plaintiff had a right to be, and was not, therefore, a trespasser.



Considering all the facts in the record it is clear that the property upon which this accident happened is private property, and there does not appear to be any duty which defendant owed plaintiff in defendant's use of such property. Hence, there being no duty to breach, there could be no negligence on the part of defendant, and, of course, there can be no recovery.

The plaintiff alleged in the complaint that the defendant was in possession and control of the house at 3519 Belmont Avenue, but it does not appear to be alleged that the defendant was in possession and control of the back yard of the premises where the accident complained of took place.

When we come to consider all of the facts and authorities cited in support of the questions involved, we are of the opinion that the court was justified in entering the order sustaining the defendant's motion for directed verdict at the close of the evidence, and in entering judgment for defendant notwithstanding the verdict of the jury. The trial court, in entering judgment for defendant notwithstanding the verdict of the jury, did not pass upon the motion for a new trial. In view of the recent decisions of the Supreme Court in the cases of Valente v. C. R. I. & P. Ry. Co., 376 Ill. 59, and Goodrich v. Sprague, 376 Ill. 80, plaintiff admits the lack of jurisdiction of this Court to pass upon the motion for new trial undisposed of by the trial court and waives his request for this Court's decision on that point. Under these circumstances we have not considered this question at this time.

For the reasons stated, the judgment for defendant will be affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

Considering all the facts in the case it is clear that the property upon which this suit is based is situated in the State of New York and there does not seem to be any valid reason for removing it to the Federal Court in defendant's use of such property. Hence, removal is not proper, there could be no removal to the Federal Court, and, of course, there can be no recovery.

The plaintiff alleged in the complaint that the defendant was in possession and control of the land in the State of New York but it does not appear to me that the defendant is in possession and control of the back yard of the premises where the complaint is made.

When we come to consider all of the facts and circumstances offered in support of the questions involved, we are of the opinion that the court was justified in entering the order in the defendant's motion for directed verdict at the close of the evidence, and in entering judgment for defendant notwithstanding the verdict of the jury. The trial court, in entering judgment for defendant notwithstanding the verdict of the jury, was not acting in error in view of the present decision of the Supreme Court in the case of Adkins v. Children's Hospital, 275 U.S. 52, 48 S.Ct. 369, 70 L.Ed. 845. In Adkins v. Children's Hospital, 275 U.S. 52, 48 S.Ct. 369, 70 L.Ed. 845, the plaintiff sought for this Court's decision of this Court to pass upon the motion for new trial submitted by the trial court and which was granted for this Court's decision on that point. Under these circumstances we have now considered this question at this time.

For the reasons stated, the judgment for defendant is affirmed.

be affirmed.

THE COURT.

SURGE, J. J. AND KIRBY, J. CONCUR.

41961

HARRY WANDKE,

Appellee,

v.

CITY OF CHICAGO, a Municipal Corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

314 I.A. 381

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

This is an action at law for the recovery of damages for personal injuries sustained by plaintiff while he was walking from a taxicab to the curb on Orchard Street in the City of Chicago. It is stated in the brief of the City that the plaintiff stepped on a piece of concrete in the street and fell, fracturing a bone in his ankle. The cause was tried before the court and a jury, and a verdict rendered in favor of plaintiff for \$1,000 upon which judgment was entered. Motions of defendant for a directed verdict, for judgment notwithstanding the verdict, for a new trial and in arrest of judgment were overruled.

It appears from the statement of facts that in 1938 the City tore up parts of the sidewalk in Orchard Street and replaced it with new sidewalk. The broken pieces of the old sidewalk were piled in the parkway between the sidewalk line and the curbing. The testimony conflicts concerning the time when the sidewalk was laid in front of 1624-26 Orchard street, the plaintiff stating that new sidewalk was laid in April of 1938 and the broken cement was piled in the parkway during April, May and June. Harold Simons, a witness for the defendant, testified that he was the watchman on the job and that the sidewalk was laid on June 4, 1938.

On June 5, 1938, the plaintiff, 41 years old, was living at 1626 N. Orchard Street. At about 4:00 o'clock in the morning he was returning from a wedding with a Mr. Rossi, in a taxicab. It was starting to get light; the cab driver stopped in front of 1624 Orchard Street; Mr. Rossi got out first and walked between two parked

Defendant

v.

CITY OF OMAHA, a Municipal Corporation

Plaintiff

IN SENATE

This is an action of law for the recovery of damages for personal injuries sustained by plaintiff which are as follows: a taxicab to the curb on Orchard Street in the City of Omaha. It is stated in the brief of the City in its initial pleading on a piece of concrete in the street and fall, resulting in his ankle. The cause was tried before the court on June 1, 1932, a verdict rendered in favor of plaintiff for \$1,000.00. Judgment was entered. Motion of defendant for a new trial and for judgment notwithstanding the verdict, for a new trial and in arrest of judgment were overruled.

It appears from the statement of facts that in 1928 the City tore up part of the sidewalk in front of the restaurant and replaced it with new sidewalk. The broken pieces of the old sidewalk were piled in the parkway between the sidewalk line and the curb. The testimony conflicts concerning the time when the sidewalk was laid in front of 1828-S Orchard Street, the plaintiff stating that new sidewalk was laid in April of 1928 and the broken concrete was piled in the parkway during April, May and June. Plaintiff states, without for the defendant, testifies that he was the waiter on the job and that the sidewalk was laid on June 4, 1928. On June 5, 1928, the plaintiff, 41 years old, was driving at 1828 S. Orchard Street. At about 4:00 o'clock in the evening he was returning from a wedding with a Mr. Gossel, in a taxicab. It was starting to get light; the cab driver stopped in front of 1828 Orchard Street; Mr. Gossel got out first and walked between the sidewalk



cars to the curbing; and the plaintiff, following him, stumbled on a piece of concrete and fell. Plaintiff testified that the piece of concrete was approximately 8 inches long and that it was of the same character as that piled on the parkway. He sustained injuries as a result of the fall, but, inasmuch as no point is here made concerning the size of the award, the nature and extent of his injuries are not set forth.

Photographs were introduced in evidence to show the condition of the street and sidewalk at the time of plaintiff's injuries. These photographs were taken on June 27, 1936. Caroline Shuemaker, who lived at 1624 N. Orchard Street, testified, "I don't know for how long a period of time the condition as shown in the picture existed. My best judgment is two months, maybe." Rossi, plaintiff's companion at the time of the accident, testified that he "saw a lot of broken stones in the street", that "the material and pieces were laying on the curb and in the parkway and on the street when Mr. Wandke fell"; that he "saw the condition as shown in Plaintiff's Exhibits 1 and 2 a couple of weeks before the accident". He did not see Wandke fall and did not know what caused him to fall. On cross-examination he admitted that he did not know whether in the two weeks before the accident there was any material of any kind in the street adjacent to the curb. The photographs admitted in evidence over defendant's objections did not show the place where Wandke fell. Exhibit 1 shows the premises at 1622 Orchard Street, next door to the place of the accident, and in Exhibit 2, the place where he fell is concealed by the automobile in the picture.

It is the contention of defendant that there is a complete failure of proof that the defendant had actual or constructive notice of the presence of an obstruction in the street, and that in the absence of such proof the defendant is not liable as a matter of law for plaintiff's injuries. As we have already indicated, the record

came to the curb; and the plaintiff, following him, stepped on a place of concrete and fell. Plaintiff testified that the place of concrete was approximately 8 inches long and that it was of the same character as that piled on the highway. He sustained injuries as a result of the fall, but, inasmuch as no claim is here being advanced the size of the award, the nature and extent of his injuries are not set forth.

Photographs were introduced in evidence to show the condition of the street and sidewalk at the time of plaintiff's injuries. These photographs were taken on June 27, 1938. Caroline Shumaker, who lived at 1824 N. Orchard Street, testified, "I don't know for how long a period of time the condition as shown in the picture existed. My best judgment is two months, maybe." Robert, plaintiff's companion at the time of the accident, testified that he "saw a lot of broken stones in the street", that "the material and pieces were laying on the curb and in the highway and on the street when Mr. Andke fell"; that he "saw the condition as shown in plaintiff's exhibits 1 and 2 a couple of weeks before the accident". He did not see Andke fall and did not know what caused him to fall. On cross-examination he admitted that he did not know whether in the two weeks before the accident there was any material of any kind in the street adjacent to the curb. The photographs admitted in evidence over defendant's objections did not show the place where Andke fell. Exhibit 1 shows the premises at 1823 Orchard Street, next door to the place of the accident, and in Exhibit 2, the place where he fell is concealed by the automobile in the picture.

It is the contention of defendant that there is a complete failure of proof that the defendant had actual or constructive notice of the presence of an obstruction in the street, and that in the absence of such proof the defendant is not liable as a matter of law. For plaintiff's injuries, as we have already indicated, the record

shows that on June 5, 1938 plaintiff walked from a taxicab to the curb in front of 1624 Orchard Street, next door to his home. He tripped and fell because of a piece of concrete lying in the Street. The City contends that there is no evidence as to how long the piece of concrete lay there. Plaintiff testified that he had seen the material piled in the parkway in April, May and June, but he "never looked in the street to see if there was any material in the street"; and that before the night of the accident he had never seen any of this material in the street where he fell. The testimony of Plaintiff's witness, Rossi, contains no evidence showing how long the concrete was in the street.

The question, therefore, as we consider it, is one of fact from the evidence as to how long this concrete was on the premises in the parkway between the sidewalk and the curb line of the street. While there is evidence in the record that the pictures showed the conditions as they existed at the time of the accident, the evidence on the question of how long the material remained there is a question of fact. There is evidence that the pieces of concrete were lying in the parkway about two months, but defendant urges that there is no testimony that any pieces of concrete were in the street for any period of time prior to the date of the accident. Although it is not altogether clear as to how long the pieces of concrete were in the street, we still have the evidence showing that the broken pieces of concrete were in the parkway to the curb of the street. While the City is not an insurer against accidents, yet the question is did the City have actual or constructive notice and did not the conditions exist long enough to put the City authorities on notice that the condition was dangerous. As we have indicated, we are of the opinion that that is a question of fact for the jury. The fact is that the concrete was lying in the street and caused plaintiff to fall and sustain injuries. Plaintiff insists that when the defendant permitted the refuse concrete to remain piled immediately adjacent to the curb,

shows that on June 5, 1935 Plaintiff's car was parked in front of 1234 Grand Street, New York City, and fell because of a piece of concrete lying in the street. The City contends that there is no evidence as to how long the piece of concrete lay there. Plaintiff insists that it was there for some time prior to the accident, but the Court, after looking in the street to see if there was any evidence in the street; and that before the night of the accident no one had seen any of this material in the street where he fell. The testimony of Plaintiff's witness, Rosen, contains no evidence showing how long the concrete was in the street.

The question, therefore, as we consider it, is one of fact from the evidence as to how long this concrete was in the street in the parkway between the sidewalk and the curb line of the street. While there is evidence in the record that the witness moved the conditions as they existed at the time of the accident, the evidence on the question of how long the material remained there is a question of fact. There is evidence that the piece of concrete was lying in the parkway about two months, but defendant argues that there is no testimony that any pieces of concrete were in the street for any period of time prior to the date of the accident. Although it is not altogether clear as to how long the pieces of concrete were in the street, we still have the evidence showing that the broken pieces of concrete were in the parkway to the curb of the street. While the City has no answer against accidents, yet the question is did the City have actual or constructive notice and did the condition exist long enough to put the City authorities on notice that the condition was dangerous. As we have indicated, we are of the opinion that that is a question of fact for the jury. The fact is that the concrete was lying in the street and caused Plaintiff to fall and cause injuries. Plaintiff insists that when the defendant permitted the refuse concrete to remain piled immediately adjacent to the curb,

for the length of time as was done in the present case, the defendant municipality had constructive notice that in all probability such loose pieces of concrete would become scattered into the street. In the case of Reed v. City of Chicago, 309 Ill. App. 129, (an abstract opinion) it was said by this court;

"The City argues that children playing in the neighborhood might have caused pieces of concrete to fall over and upon the sidewalk and it is urged that this would constitute an intervening cause tending to relieve the City of liability. This contention is untenable, however, because the evidence showed that the dangerous condition of the sidewalk had existed for several weeks before the accident and the City foreseeing the danger of permitting these piles of debris to remain upon the sidewalk should have protected pedestrians who were rightfully upon the sidewalk from danger". "The City had been repaving the street north of Armitage Avenue, and its employees had taken the concrete, madadam and stones from the street and placed them in piles along the curb."

In that case the plaintiff "stumbled upon a piece of concrete which was on the sidewalk and sustained the injury. \* \* \*", and the case is somewhat analagous to the facts in the present record. We are of the opinion that the question of notice to the City was one of fact for the jury to pass upon. In Muesig v. Hart, 283 Ill. App. 115, a case which has some bearing on the question in the instant case, the court said;

"Vehicles had the right to use the highway from curb to curb, and even if the plank customarily lay near the curb, it nevertheless, in that position, constituted a dangerous obstruction. Heavy rains might cause it to float away from the curb, or a vehicle might strike it a glancing blow as it lay near the curb and cause it to be moved farther out into the road and into the path of passing cars. The jury were justified in finding that the accident was caused by the automobile striking a timber upon McCormick road at a point where Arthur Avenue, if extended, would intersect that road, and they were further justified in finding that the timber was the one that was used by defendants Harz and Warfield for the purpose of enabling automobiles to cross over the curb and into their golf practice course. It is true, as defendants argue, that there is no direct evidence to show how or just when the timber was moved from the curb to the point on the roadway where the automobile hit it, but the jury were justified in finding, from all the facts and circumstances, that, shortly before the accident, a downpour of rain or the passing traffic on the road, or both, caused it to be moved from the curb to the point where the automobile hit it."

We have also to consider under the facts of this case, the question of contributory negligence on the part of plaintiff. It is suggested that the mere knowledge of the existence of a defect or dangerous condition in a sidewalk, does not make the user thereof

for the length of time as was done in the present case, the defendant  
unlawfully had constructive notice that in all probability such  
loose pieces of concrete would become scattered into the street. In  
the case of Head v. City of Chicago, 308 Ill. App. 159, (an abstract  
opinion) it was said by this court:

"The City argues that children playing in the neighborhood  
might have caused pieces of concrete to fall over and upon the side-  
walk and it is urged that this would constitute an intervening cause  
tending to relieve the City of liability. This contention is unavailing,  
however, because the evidence showed that the dangerous condition of  
the sidewalk had existed for several weeks before the accident and  
the City, knowing the danger of permitting these pieces of debris  
to remain upon the sidewalk should have protected pedestrians who  
were rightfully upon the sidewalk from danger." The City had been  
regarding the street north of Armitage Avenue, and its employees  
had taken the concrete, masonry and stones from the street and placed  
them in piles along the curb."

In that case the plaintiff "stumbled upon a piece of concrete which  
was on the sidewalk and sustained the injury." " " " and the case is  
somewhat analogous to the facts in the present record. " " " and it is  
the opinion that the question of notice to the City was one of fact  
for the jury to pass upon. In Morris v. City of Chicago, 303 Ill. App. 116, a case  
which has some bearing on the question in the instant case, the court  
said:

"Vehicles had the right to use the highway from curb to  
curb, and even if the plank counterweight lay near the curb, it never-  
theless, in that position, constituted a dangerous obstruction. Heavy  
traffic might cause it to float away from the curb, or a vehicle might  
strike it a glancing blow as it lay near the curb and cause it to be  
moved farther out into the road and into the path of passing cars.  
The jury were justified in finding that the accident was caused by  
the automobile striking a timber upon "concrete road at a point where  
Arthur Avenue, it extended, would intersect that road, and that were  
further justified in finding that the timber was the one that was  
used by defendant's team and -entitled for the purpose of enabling  
automobiles to cross over the curb and into their golf practice course.  
It is true, as defendant argues, that there is no direct evidence to  
show how or just when the timber was moved from the curb to the point  
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in finding, from all the facts and circumstances, that, shortly  
before the accident, a dangerous condition of timber on the  
road, or both, caused it to be moved from the curb to the point  
where the automobile hit it."

We have also to consider under the facts of this case, the  
question of contributory negligence on the part of plaintiff. It is  
suggested that the mere knowledge of the existence of a defect or  
dangerous condition in a sidewalk, does not make the user thereof

guilty of contributory negligence as a matter of law, and the case of Wallace v. City of Farmington, 231 Ill. 232, cited. It appears from the opinion in that case that;

"The use of a defective sidewalk by a person who has knowledge of the defect is not negligence per se, and if, while walking upon that sidewalk such person is in the exercise of ordinary care for his or her safety, there may be a recovery in case of an injury."

We further find from the opinion in City of Mattoon v. Faller, 217 Ill. 273, that it is said;

"It is, however, well settled law in this State, that, where a man knows of a defect in a sidewalk and walks thereon, his doing so with such knowledge is not negligence per se, as matter of law. The fact that he goes upon the sidewalk with knowledge of the existing defect, is a circumstance to be taken into consideration by the jury with all the other facts and circumstances in determining the question, whether he was guilty of contributory negligence."

In the instant case the evidence does not indicate that the plaintiff had knowledge of the pieces of concrete lying in the street in front of his home or next to it, and, while he may not have seen it, it was not altogether his duty to examine the roadway to determine if it was safe to walk upon. The question of contributory negligence on his part is, however, a question of fact for the jury to decide. The jury, in passing upon the facts as presented to them, found the defendant guilty and assessed plaintiff's damages in the sum of \$1,000, and we are of the opinion that there is nothing in the record to suggest error in the finding of the jury.

The City criticizes some of the statements made in plaintiff's brief, but upon examination of the questions involved we are of the opinion that there was sufficient evidence to justify finding the City guilty as charged in the Complaint, and that the facts do not warrant the finding of contributory negligence on the part of plaintiff as a matter of law. The trial court did not err in refusing to direct a verdict and in denying defendant's motions for judgment notwithstanding the verdict for a new trial, and in arrest of judgment; and the judgment of the trial court is, therefore, affirmed.

AFFIRMED.

BURKE, P. J. AND KILEY, J. CONCUR.

guilty of contributory negligence.

Alvarez v. City of Richmond, 171 Va. 520, 199 S.W.2d 1017 (1947).

from the opinion in the case of

"The use of the word 'negligence' in the context of the defect in the building was not, as the court said, 'a mere statement of fact' but a statement of opinion as to the cause of the defect, and the court was not bound by the finding of the jury."

is further filed from the opinion in Alvarez v. City of Richmond, 171 Va. 520, 199 S.W.2d 1017 (1947).

275, that it is said:

"It is, however, well settled that in such cases a man knows of a defect in a building and takes the necessary steps to remedy it. With such knowledge he is not negligent. The fact that he goes upon the building with knowledge of the defect is a circumstance to be taken into consideration in determining whether the other facts and circumstances in the case, taken together, establish his guilt of contributory negligence."

In the instant case the evidence does not show that the defendant had knowledge of the defect of concrete lying in the street in front of his home or next to it, and, while he may not have known it, he was not altogether his duty to examine the building. It is not safe to say, however, that the question of contributory negligence is a part of, however, a question of fact for the jury to decide. In passing upon the facts it is necessary to find the defendant guilty and assessed a liability against him for the amount of \$1,000.00. One of the opinions in the case is that there is nothing in the facts to suggest error in the finding of the jury.

The City criticizes some of the statements made in the opinion, but upon examination of the questions involved by one of the opinions that there was sufficient evidence to justify finding the City guilty as charged in the complaint, and that the court do not warrant the finding of contributory negligence on the part of the defendant as a matter of law. The trial court did not err in refusing to grant a verdict and in denying the defendant's motion for judgment notwithstanding the verdict for a new trial, and in granting judgment. The judgment of the trial court is, therefore, affirmed.

affirmed.

THOMAS, J., and ALLEN, J., concur.



46127

JUDITH F. REAGAN,

Appellee,

v.

LUCILLE A. SEARLES, ET AL,  
On Appeal of LUCILLE A. SEAR-  
LES, Appellant.

314 I.A. 381<sup>2</sup>

MR. JUSTICE MEEK delivered the opinion of the court.

This is an appeal from an interlocutory order of the Superior Court of Cook County appointing a receiver in a suit for closing a trust deed securing a second mortgage for \$1,800.00 upon real estate in Chicago, Illinois. The defendant defaulted in payment of <sup>part of</sup> the principal and interest and plaintiff sued declaring the entire debt due. A receiver was appointed September 20, 1941 on plaintiff's motion based on the complaint. Thereafter, on October 14, defendant filed a petition to vacate the order and charged lack of notice of plaintiff's motion and insufficiency of the complaint to warrant the appointment. On October 30, 1941, defendant filed her answer and on October 31 an amended petition to vacate the order of appointment, which amendment in addition to the original charges, stated that the premises were more than sufficient security, notwithstanding defaults, to protect plaintiff's debt and that the order of appointment in authorizing collection of all back rents held by the tenants in possession, exceeded the limits of the trust deed; and further, that no complainant's bond was required by the order and none had been filed. The trial court by order, on November 3rd, vacated the order of September 20th and appointed

IN RE: LUCILLE A. SEAR,  
ET AL.  
On Appeal of LUCILLE A. SEAR,  
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a receiver on plaintiff's motion, authorized the collection of rents in accordance with the trust deed, and provided for receiver's and plaintiff's bonds. The trial court in that order also denied defendant's motion to vacate the order "again appointing" the receiver. An attorney for the receiver was appointed by order of November 10, over the objections of the defendant. The defendant has appealed from the order of November 3rd and assigns as error also the appointment of the attorney.

The defendant contends that the complaint is insufficient in substance and in its verification. No motion was directed at the verification in the trial court and we shall not consider the point.

The plaintiff had the burden of presenting facts in his complaint showing the necessity for the appointment. Frank v. Siegel, 263 Ill. App. 316. The appointment here was made solely on the allegations in paragraph 8 of the complaint, wherein, among other things, it is charged that general taxes for 1939 and 1940 are due and unpaid with interest, costs and penalties; that the premises are meager and scant security; that the rents, issues and profits are not being applied to the payment of taxes, interest or principal on the instant trust deed, or a prior trust deed; that it is necessary that a receiver be appointed to preserve the real estate and to collect the rents, issues and profits for the protection of the security.

When the receiver was originally appointed the defendant had no notice and the order of appointment was set aside. When the re-appointment was made on November 3rd, the court had before it the defendant's answer setting up as new matter that there was usury in the mortgage transaction; denying that the property was meager and scant security; and stating that its fair, reasonable value was \$25,000.00 more than sufficient

a receiver on plaintiff's motion, as ordered by the court in its order of November 10, 1940, and the receiver was appointed by order of November 10, 1940, over the objection of the defendant. The defendant was appointed as receiver of the property on November 10, 1940, and assigns as error also the appointment of the attorney.

The defendant contends that the complaint is insufficient in substance and in its verification. No motion was directed at the verification in the trial court and we shall not consider the point.

The plaintiff had the burden of presenting facts in its complaint showing the necessity for the appointment. Frank v. Steel, 283 Ill. App. 316. The complaint here was made solely on the allegations in paragraph 8 of the complaint, wherein, among other things, it is charged that general taxes for 1939 and 1940 are due and unpaid with interest, costs and penalties; that the premises are mesgor and scant security; that the rents, issues and profits are not being applied to the payment of taxes, interest or principal on the instant trust deed, or a prior trust deed; that it is necessary that a receiver be appointed to preserve the real estate and to collect the rents, issues and profits for the protection of the security.

When the receiver was originally appointed the defendant had no notice and the order of appointment was set aside. When the re-appointment was made on November 10, 1940, the court had before it the defendant's answer setting up as new matter that there was money in the mortgage transaction; denying that the property was mesgor and scant security; and stating that its fair, reasonable value was \$85,000.00 more than sufficient

security, notwithstanding the unpaid taxes. There was no reply to the answer, no evidence was heard but the receiver was reappointed. Aside from considerations of the answer, the allegation of the complaint as to meager and scant security, is insufficient to justify the appointment, even though the rents, issues and profits were pledged to secure the debt.

Frank v. Alcorn, 203 Ill. App. 312. The general allegation as to unpaid taxes is insufficient because there is no showing that the security was thereby endangered or that there was not still sufficient security for the debt. In Althaus v. Kohn, 202 Ill. App. 324, cited by plaintiff to support his contention that the default in payment of taxes was sufficient to justify the appointment of a receiver, there were specific allegations of fact, in the complaint, of a prior lien giving the amount thereof and the amount of the defaulted taxes, from both of which danger to plaintiff's lien could be inferred. Here there are no such allegations and, accordingly, we believe the general allegation of unpaid taxes is insufficient to warrant the appointment. The mere statement of non-application of rents, issues and profits, charges nothing wrongful on the part of the defendant and the remaining allegation is a conclusion. The sum of the allegations does not meet the requirement of the rule that it is inherent in the nature of this proceeding that the necessity for the appointment of a receiver must be shown. Frank v. Alcorn, 203 Ill. App. 312.

We believe that the receiver in this case was inadvertently appointed and the order is, therefore, reversed. This conclusion also disposes of the question of the appointment of the attorney for the receiver.

ORDER REVERSED.

MURPHY, P. J. AND HENRI, CONCUR.

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1877. The letter is signed by Rutherford B. Hayes and is addressed to the Senate and House of Representatives. The letter is a copy of the original, which is in the possession of the President of the United States.

2. The second part of the document is a letter from the President of the United States to the Congress, dated January 3, 1877. The letter is signed by Rutherford B. Hayes and is addressed to the Senate and House of Representatives. The letter is a copy of the original, which is in the possession of the President of the United States.

3. The third part of the document is a letter from the President of the United States to the Congress, dated January 3, 1877. The letter is signed by Rutherford B. Hayes and is addressed to the Senate and House of Representatives. The letter is a copy of the original, which is in the possession of the President of the United States.

4. The fourth part of the document is a letter from the President of the United States to the Congress, dated January 3, 1877. The letter is signed by Rutherford B. Hayes and is addressed to the Senate and House of Representatives. The letter is a copy of the original, which is in the possession of the President of the United States.

5. The fifth part of the document is a letter from the President of the United States to the Congress, dated January 3, 1877. The letter is signed by Rutherford B. Hayes and is addressed to the Senate and House of Representatives. The letter is a copy of the original, which is in the possession of the President of the United States.

6. The sixth part of the document is a letter from the President of the United States to the Congress, dated January 3, 1877. The letter is signed by Rutherford B. Hayes and is addressed to the Senate and House of Representatives. The letter is a copy of the original, which is in the possession of the President of the United States.

7. The seventh part of the document is a letter from the President of the United States to the Congress, dated January 3, 1877. The letter is signed by Rutherford B. Hayes and is addressed to the Senate and House of Representatives. The letter is a copy of the original, which is in the possession of the President of the United States.

8. The eighth part of the document is a letter from the President of the United States to the Congress, dated January 3, 1877. The letter is signed by Rutherford B. Hayes and is addressed to the Senate and House of Representatives. The letter is a copy of the original, which is in the possession of the President of the United States.

9. The ninth part of the document is a letter from the President of the United States to the Congress, dated January 3, 1877. The letter is signed by Rutherford B. Hayes and is addressed to the Senate and House of Representatives. The letter is a copy of the original, which is in the possession of the President of the United States.

10. The tenth part of the document is a letter from the President of the United States to the Congress, dated January 3, 1877. The letter is signed by Rutherford B. Hayes and is addressed to the Senate and House of Representatives. The letter is a copy of the original, which is in the possession of the President of the United States.

41808

MARY B. SEVIER, Administratrix of )  
the Estate of Albert E. Sevier, )  
Deceased, )

Appellee, )

v. )

CHARLES M. THOMSON, Trustee of )  
Chicago and North Western Railway )  
Company, (substituted for Charles )  
P. Megan, Trustee), )

Appellant. )

APPEAL FROM

SUPERIOR COURT, 16

COOK COUNTY. 24

314 I.A. 382

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant under the provisions of the Federal Employers' Liability act to recover for the death of her husband, Albert E. Sevier; upon the first trial she had a verdict and judgment for \$15,000; a new trial was granted and this court, granting leave to appeal from that order, affirmed it. (305 Ill. App. (abst.) 165.) Upon the second trial plaintiff had a verdict and judgment for \$20,000, and this appeal is from that judgment.

Our former opinion outlines the facts substantially as follows. Between 9 and 10 o'clock on the night of May 21, 1937, defendant's southbound freight train consisting of 86 empty cars on which Sevier was employed as head brakeman, stalled while going up a rather steep hill about 2 miles north of Buda, Illinois; Sevier was riding in the engine on the fireman's or east side of the train; he inquired of the engineer if he should drop off the train and investigate as to the cause of the stalling; the engineer assented to this and Sevier walked back to see what was wrong.

The evidence tends to show that Sevier decided to cut the train between the 36th and 37th cars. When a train must be cut in two under such circumstances it is uncoupled about the middle of the train and the engine then proceeds with the forward section to the next place on the line where there is a sidetrack

MARY B. BEVIER, Administratrix of  
the Estate of Albert B. Bevier,  
Deceased,

Appellee,

v.

CHARLES M. THOMSON, Trustee of  
Chicago and North Western Railway  
Company, (substituted for Charles  
P. Morgan, Trustee),  
Appellant.

814114132

MR. PRESIDING JUDGE: Now on appeal from the judgment of the court below.

Plaintiff brought suit against defendant under the

provisions of the Federal Employers' Liability Act to recover for the death of her husband, Albert B. Bevier; upon the first trial she had a verdict and judgment for \$12,000; a new trial was granted and this court, granting leave to appeal from that order, affirmed it. (305 Ill. App. (dist.) 106.) Upon the second trial plaintiff had a verdict and judgment for \$20,000, and this appeal is from that judgment.

Our former opinion outlines the facts substantially as follows. Between 9 and 10 o'clock on the night of May 21, 1927, defendant's southbound freight train consisting of 86 empty cars on which Bevier was employed as head brakeman, stalled while going up a rather steep hill about 2 miles north of Buda, Illinois; Bevier was riding in the engine on the fireman's on east side of the train; he inquired of the engineer if he should drop off the train and investigate as to the cause of the stalling; the engineer assented to this and Bevier walked back to see what was wrong.

The evidence tends to show that Bevier decided to cut the train between the 85th and 87th cars. When a train must be cut in two under such circumstances it is uncoupled about the middle of the train and the engine then proceeds with the forward section to the next place on the line where there is a sidetrack



and these cars are left there; the engine then returns to the rear section and, coupling on to it, hauls it to the sidetrack where the two sections are then coupled together and the train proceeds on its way. The evidence tends to show that Sevier followed the usual procedure in such cases, closing the angle cocks - one on the rear of the 36th car and the other on the front of the 37th car, then uncoupling the automatic air brakes between the two cars. Defendant says that at this point the next thing to do is to open the rear angle cock, thus setting the air brakes so the rear cars cannot move. Sevier crossed over to the engineer's or west side of the train; the engineer then backed up the train so as to take the strain off the draw bars and Sevier pulled the pin by using a lever on the side of the car, thus cutting the train at this point. When the process of cutting the train is completed the brakeman ordinarily signals the engineer to go ahead with the forward section of the train.

Defendant argues that plaintiff failed to set the brakes on the rear section by reopening the angle cock, which would set the brakes, and that as the result of this failure, when the cars were uncoupled the unbraked rear section started to move down hill and that to stop this Sevier went between the two sections and closed the angle cock on the car at the head of the rear section, thus stopping it - witnesses say suddenly, and that while doing this he was caught between the stopped rear section and the backing forward section and crushed to death.

The evidence showed that there were two movements backward of the train. The first enabled Sevier to pull the pin and uncouple the cars. The jury could properly believe that when this was done he signaled to the engineer with the lantern he was carrying that the train had parted. Defendant argues this signal was to back up, but there was testimony to the contrary. It

and these cars are left there; the engine then returns to the rear section and, coupling on to it, hauls it to the sidetrack where the two sections are then coupled together and the train proceeds on its way. The evidence tends to show that Sevier followed the usual procedure in such cases, placing the angle cooke - one on the rear of the 37th car and the other on the front of the 37th car, then uncoupling the automatic air brakes between the two cars. Defendant says that at this point the next thing to do is to open the rear angle cooke, thus setting the air brakes so the rear cars cannot move. Sevier crossed over to the engineer's or west side of the train; the engineer then backed up the train so as to take the strain off the draw bars and Sevier pulled the pin by using a lever on the side of the car, thus cutting the train at this point. When the process of cutting the train is completed the brakemen ordinarily signal the engineer to go ahead with the forward section of the train. Defendant argues that plaintiff failed to set the brakes on the rear section by reopening the angle cooke, which would set the brakes, and that as the result of this failure, when the cars were uncoupled the unbraked rear section started to move down hill and that to stop this Sevier went between the two sections and closed the angle cooke on the car at the head of the rear section, thus stopping it - witnesses say suddenly, and that while doing this he was caught between the stopped rear section and the backing forward section and crushed to death.

The evidence showed that there were two movements backward of the train. The first enabled Sevier to pull the pin and uncouple the cars. The jury could properly believe that when this was done he signaled to the engineer with the lantern he was carrying that the train had parted. Defendant argues this signal was to back up, but there was testimony to the contrary. It

would be hardly reasonable to believe that after the cars had been uncoupled Sevier would signal the engineer to back up, for there would then be no necessity for backing the forward section of the train. It would be much more reasonable to believe that the signal to the engineer was to indicate that the cut had been made so that the forward section could proceed on its way to the next siding.

This is not inconsistent with defendant's argument that Sevier, before uncoupling the cars, did not close the angle cock on the rear section and hence it commenced to move down the hill. Sevier could reasonably assume that when he uncoupled the cars and had so signaled the engineer, the forward section of the train would proceed southward and he could safely proceed to close the angle cock on the first rear section car thus stopping it, wholly unaware that the forward section, with no signal from the engine, was backing toward the rear section. This is supported by the fact that Sevier's back was toward the forward section, which backed between "20 and 60 feet" before it ran into the rear section which was braked to a standstill. If the forward section had not so backed the accident would not have happened.

In any event we cannot say that the jury could not reasonably accept plaintiff's version of the manner in which the accident happened. Certainly all reasonable men would not agree that the accident was caused solely by the negligence of Sevier and that there was no negligence on the part of the engineer of the train.

Plaintiff also says that defendant's rule 14 requires that a signal to back be acknowledged by the engineer with three short whistles of the engine, and that even if Sevier's signal to the engineer was a back-up signal this rule was violated by the engineer's failure to sound the whistle. In many cases in-

would be hardly reasonable to believe that after the time that  
been uncoupled Devier would have been able to see the signal  
there would then be no necessity for looking back and seeing  
of the train. It would be much more reasonable to believe that  
the signal to the engineer was to indicate that the car had been  
made so that the forward section could proceed on its way to the  
next siding.

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Devier, before uncoupling the cars, did not close the angle cock  
on the rear section and hence it commenced to move down the hill.  
Devier could reasonably assume that when he uncoupled the cars  
and had so signalled the engineer, the forward section of the  
train would proceed southward and he could safely proceed to  
close the angle cock on the first rear section and then stopping  
it, wholly unaware that the forward section, with no signal from  
the engine, was backing toward the rear section. This is sup-  
ported by the fact that Devier's back was toward the forward  
section, which backed between "80 and 85 feet" before it ran  
into the rear section which was backed to a standstill. If the  
forward section had not so backed the accident would not have  
happened.

In any event we cannot say that the jury could not reason-  
ably accept plaintiff's version of the manner in which the acci-  
dent happened. Certainly all reasonable men would not agree that  
the accident was caused solely by the negligence of Devier and  
that there was no negligence on the part of the engineer or the  
train.

Plaintiff also says that defendant's rule is to release  
that a signal to back be acknowledged by the engineer with three  
short whistles of the engine, and that even if Devier's signal  
to the engineer was a back-up signal this rule was violated by  
the engineer's failure to sound the whistle. In many cases in-

volving similar facts judgments in favor of the plaintiffs were sustained. Waiswila v. Illinois Central R. Co., 220 Ill. App. 113, 118; Central R. Co. of N. J. v. Colasurdo, 192 Fed. 901; Gaffney v. N. Y. Consolidated R. Co., 220 N. Y. 34; Musgrove v. M. & L. S. Ry. Co., 259 Mich. 469; Lancaster v. Fitch, 239 S. W. (Texas Civ. App.) 265. In Roth v. Schaefer, 300 Ill. App. 464, 469, we said: "In a case based on defendants' claimed negligence it is not necessary that the evidence demonstrate such negligence, 'but responsibility for the accident must be determined upon the reasonable conclusions to be drawn from the evidence'." (Citing Denny Bros. v. Goldblatt, 298 Ill. App. 325 and Union Pacific R. Co. v. Huxoll, 245 U. S. 535.)

Defendant argues at some length that there were reversible errors in the rulings of the trial court in the admission and exclusion of evidence. While some of these rulings might be open to slight objection, yet we find nothing of sufficient importance to demand a reversal.

Neither were there errors in the giving or refusing of instructions. They were for the most part passed upon and approved in our prior opinion in this case. (305 Ill. App. 165.)

We find no procedural errors which would require a reversal. The decisive questions presented relate to the facts, and as two juries in this case have found for the plaintiff and the verdict is reasonably consistent with the evidence, we would not be justified in reversing for a third trial.

The judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

...domestic at the moment, and

the verdict is reasonably consistent with the evidence, we could and as two juries in this case have found for the plaintiff and reversal. The decisive questions presented relate to the facts, We find no procedural errors which would require a

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(Gitting Danny Bros. v. Goldblatt) 208 Ill. App. 3d 1001, 1002 (1978)

!but responsibility for the accident must be determined upon

(Texas Civ. App.) 265. In 1904 a donation of \$100,000 was made to the University of Texas, which was then known as the University of the State of Texas. The donation was made by the State of Texas, and was for the purpose of establishing a fund for the support of the University. The fund was established in 1904, and was known as the University of Texas Fund. The fund was used for the purpose of supporting the University, and was used for the purpose of paying the salaries of the faculty and the expenses of the University. The fund was used for the purpose of paying the salaries of the faculty and the expenses of the University. The fund was used for the purpose of paying the salaries of the faculty and the expenses of the University.

113: 118: Central  
113: 119: Co. of N. J. & Delaware, Inc. 1001

DATE OF INFO IN LTR TO HQ: 7 JANUARY 1968

41846

CRITERION ADVERTISING CO., INC.,  
a corporation,

Appellant,

v.

CLEMENSEN'S FLORISTS &  
DECORATORS, INC., a corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

314 I.A. 383

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an adverse judgment upon trial by the court wherein it claimed \$226 to be due from defendant to it for advertising services furnished pursuant to a contract between the parties. Defendant answered that it had exercised its right under the terms of the contract to terminate it and had paid plaintiff in full for all advertising furnished prior to the date of termination. No brief has been filed in behalf of the defendant.

The contract, dated April 6, 1937, authorized plaintiff to install and maintain certain poster panels in Chicago, advertising defendant's business, for which service defendant agreed to pay a certain amount per month for 36 months, commencing from the date of the completion of the placing of such panels at certain locations in Chicago. The contract also contained a provision as follows: "This contract may be cancelled at the end of the first twelve months of service by giving notice in writing to the Criterion Advertising Co., Inc. ninety days in advance of the expiration of the first twelve months of service and by paying an additional 35 cents per board per month for the period used."

The evidence before the trial court was a stipulation of the facts, with certain exhibits. It was agreed that the of commencing the services under the contract was May 24, 1937. In order for defendant to avail itself of the election to

CRITERION ADVERTISING CO., INC.,  
a corporation,

Appellant,

v.

OLENSEN'S FLORESTA &  
DECORATORS, INC., a corporation,

Appellee.

APPEAL FROM  
CIRCUIT COURT  
OF CHICAGO.

81-111-583

MR. PRESIDING JUSTICE MORAN BY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an adverse judgment upon trial

by the court wherein it claimed \$928 to be due from defendant to it for advertising services furnished pursuant to a contract between the parties. Defendant answered that it had exercised its right under the terms of the contract to terminate it and had paid plaintiff in full for all advertising furnished prior to the date of termination. No trial has been held in behalf of the defendant.

The contract, dated April 6, 1937, authorized plaintiff to install and maintain certain poster panels in Chicago, advertising defendant's business, for which service defendant agreed to pay a certain amount per month for 36 months, commencing from the date of the completion of the placing of such panels at certain locations in Chicago. The contract also contained a provision as follows: "This contract may be cancelled at the end of the first twelve months of service by giving notice in writing to the Criterion Advertising Co., Inc. ninety days in advance of the expiration of the first twelve months of service and by paying an additional 35 cents per board per month for the period used." The evidence before the trial court was a stipulation of the facts, with certain exhibits. It was agreed that the contract was made May 24, 1937, and that the contract was made under the contract was May 24, 1937. In order for defendant to avail itself of the election to



the contract at the end of the first 12 months of service it was necessary for it to notify the plaintiff to this effect 90 days before that date, which would be on or before February 24, 1938. Such notice was not given until March 26, 1938.

Plaintiff replied to this notice by letter dated April 2, calling attention to the provisions in the cancellation clause of the contract and saying that notice received March 26 was too late to be effective, and that the contract would remain in effect for the full period of 36 months.

Defendant apparently agreed to this, as shown by its letter of October 3, 1938 to plaintiff in which it was admitted that the request for cancellation was not made in time, and also by the fact that it failed to pay an additional 35 cents for each advertising board per month for the period used if the contract was cancelled according to its terms. After this refusal by plaintiff to consider the contract cancelled, defendant for a time paid plaintiff for the services according to the agreement.

Subsequently, in September 1939, plaintiff brought suit against defendant for the sum then claimed to be due and owing under the contract, and in that case the court entered judgment for the plaintiff, which was afterwards paid in full by the defendant. In the instant case the facts as to this prior suit were stipulated and it was also agreed that all of the issues raised in the instant case were tried in the previous case and that there was no change in the circumstances between the case now presented and the case previously presented. It was also agreed that plaintiff furnished the services provided in the contract until the termination of the same by its terms. This suit is brought for the remaining installments coming due after the date the prior suit was filed.

Bour v. Kimball, 46 Ill. App. 327, involved facts almost identical with those in the present case. It was there held that

the contract at the end of the first month of service. It was necessary for it to notify the plaintiff at least 30 days before that date, which would be on or before February 26, 1938. Such notice was not given until March 18, 1938.

Plaintiff replied to this notice by letter dated April 8, calling attention to the provision in the cancellation clause of the contract and saying that notice received March 26 was too late to be effective, and that the contract should remain in effect for the full period of 36 months.

Defendant apparently agreed to this, as shown by its letter of October 5, 1938 to plaintiff in which it was advised that the request for cancellation was not made in time, and also by the fact that it failed to pay an additional 35 cents for each advertising board per month for the period used in the contract was cancelled according to its terms. After this refusal by plaintiff to consider the contract cancelled, defendant for a time paid plaintiff for the services according to the agreement. Subsequently, in September 1939, plaintiff brought suit against defendant for the sum then claimed to be due and owing under the contract, and at that time the court and the judgment for the plaintiff, which was afterwards paid in full by the defendant. In the instant case the facts as to this prior suit were stipulated and it was also agreed that all of the issues raised in the instant case were tried in the previous case and that there was no change in the circumstances between the case now presented and the case previously presented. It was also agreed that plaintiff furnished the services provided in the contract until the termination of the same by its terms. This suit is brought for the remaining installments coming due after the date the prior suit was filed.

Bour v. Kimball, 46 Ill. App. 327, involved facts identical with those in the present case. It was there held that

the privilege to terminate an advertising contract must be exercised according to its terms and that if notice is not given within the time provided in the contract such attempted cancellation is ineffectual. Another advertising case involving very similar facts and to the same effect is Railway Advertising Co. v. Posner, 71 N. Y. S. 742. See also Williston on Contracts, (Revised Edition) Vol. 3, §853 (note 14), which states the general rule to the effect that time is of the essence of options to terminate or cancel an existing contract.

Moreover, defendant in its letter of October 3, 1938, addressed to plaintiff, virtually admitted its obligations under the contract by stating that plaintiff knew it "will get your money anyway," although the letter indicated that defendant felt "provoked" toward plaintiff for not accepting the notice of cancellation, which defendant admitted was not in compliance with the cancellation clause.

For the reason that the notice of cancellation was not given in apt time the judgment of the trial court is reversed and judgment is entered in this court for plaintiff and against the defendant for \$226.

REVERSED AND JUDGMENT FOR PLAINTIFF HERE.

Matchett, J., concurs.  
O'Connor, J., dissents.

the privilege to terminate an advertising contract must be exercised according to its terms and that if notice is not given within the time provided in the contract such attempted cancellation is ineffectual. Another advertising case involving very similar facts and to the same effect is Halifax Advertising Co. v. Fox, 11 N. Y. S. 2d 742. See also Illinois Co. Contract, (reversed) 101 N. Y. S. 2d 823 (note 14), which states the general rule to the effect that time is of the essence of options to terminate or cancel an existing contract.

Moreover, defendant in its letter of October 3, 1936, addressed to plaintiff, virtually admitted its obligations under the contract by stating that plaintiff knew it "will get your money anyway," although the letter indicated that defendant felt "provoked" toward plaintiff for not accepting the notice of cancellation, which defendant admitted was not in compliance with the cancellation clause.

For the reason that the notice of cancellation was not given in apt time the judgment of the trial court is reversed and judgment is entered in this court for plaintiff and against the defendant for \$250.

REVEREND AND HONORABLE FOR PLAINTIVE HON.

McDonnell, J., concurs.  
O'Connor, J., dissents.

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it was there held that

41867

MARK D. KALISCHER,  
Appellant and Cross-Appellee,

v.

LUDWIG SUSSMAN, ROSE SUSSMAN  
and ADELPHI THEATRE CORPORATION,  
a corporation,  
Appellees and Cross-Appellants.)

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

314 I.A. 383<sup>2</sup>

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his complaint setting forth his association with defendant Ludwig Sussman in the management of the Adelphi Theatre Corporation, which operates a moving picture show; he asks for an accounting, asserting that Sussman had illegally received and appropriated moneys of the corporation by voting himself excessive salaries and \$1500 as a bonus; he asked that this bonus and moneys belonging to the corporation be returned to it, and for the appointment of a receiver for the corporation. Answers were filed in behalf of the defendants and the cause was referred to a master to take evidence and report his conclusions. Both parties appeal from the decree.

The master found that Sussman was the owner of 90 shares of stock of the theatre corporation, and plaintiff the owner of 30 shares, which aggregates the 120 shares issued; that for a time plaintiff drew a salary of \$25 a week and that Sussman drew \$100 a week, but beginning with 1936 Sussman's salary was increased to \$400 a week and plaintiff was not given any salary and was not permitted to participate in the operation of the theatre; the master found that a reasonable weekly salary paid to Sussman as manager of the theatre was not entitled to the bonus of \$1500 and should be returned to the theatre corporation. Plaintiff, being a stockholder in the theatre company, is entitled to a voice in

MARK D. KALLISCHEN,  
Appellant and Cross-Appellee,

v.

LUDWIG GUSMAN, ROSE GUSMAN  
and ADDELPHI THEATRE CORPORATION,  
a corporation,  
Appellees and Cross-Appellants.

APPEAL FROM  
COURT OF COMMON PLEAS,  
COLUMBIA COUNTY.

MR. PRESIDING JUSTICE McHURRY D. L. IV AND THE CLERK OF THE COURT.

Plaintiff filed his complaint setting forth his associa-  
tion with defendant Ludwig Gusman in the management of the  
Adelphi Theatre Corporation, which operates a moving picture  
show; he asks for an accounting, asserting that Gusman had  
illegally received and appropriated moneys of the corporation  
by voting himself excessive salaries and \$1500 as a bonus; he  
asked that this bonus and moneys belonging to the corporation  
be returned to it, and for the appointment of a receiver for the  
corporation. Answers were filed in behalf of the defendants and  
the cause was referred to a master to take evidence and report  
his conclusions. Both parties appeal from the decree.

The master found that Gusman was the owner of 90 shares  
of stock of the theatre corporation, and plaintiff the owner of  
30 shares, which aggregates the 120 shares issued; that for a  
time plaintiff drew a salary of \$25 a week and that Gusman drew  
\$100 a week, but beginning with 1936 Gusman's salary was in-  
creased to \$400 a week and plaintiff was not given any salary  
and was not permitted to participate in the operation of the  
theatre; the master found that a reasonable weekly salary  
paid to Gusman as manager of the theatre was \$1500 and  
was not entitled to the bonus of \$1500 and that plaintiff  
should be returned to the theatre corporation.

found that plaintiff, being a stockholder  
involved facts of the  
theatre company, is entitled to a voice in  
It was there held that

penses of the theatre; also that some of the expenses of this litigation had been paid by the theatre corporation and that all of these expenses should be paid by Sussman, personally, and not by the theatre. The master refused to recommend that a receiver be appointed.

Objections were filed by both parties and exceptions were heard by the court. A decree was entered overruling all of the exceptions of plaintiff to the report. The decree sustained the exceptions filed by Sussman to that part of the report finding that \$150 a week was a reasonable salary to be paid to him as manager.

The master had also found that some of the expenses of this litigation had been paid by the theatre corporation and that these expenses should be paid by Sussman, personally. Defendants' exception to this finding was sustained by the chancellor, although in his opinion giving the reasons for his conclusions the chancellor said he found nothing at all in the record about the theatre paying out money for Sussman in this litigation but that if it did so Sussman should return it, as "this is his personal law suit." Apparently no showing was made as to what amount, if any, has been paid by the theatre.

The decree denied the prayer of the plaintiff for the appointment of a receiver for the Adelphi Theatre Corporation and denied his prayer for a dissolution of the corporation and the distribution of its assets and property. The decree also denied all other relief sought by plaintiff, except as to the finding that Sussman was not entitled to any bonus, and held that this should be returned to the corporation.

Plaintiff has appealed from the decree, except as to that part which orders the return of the bonus money, and defendants appeal from that part of the decree and also from that part which refused to dismiss plaintiff's amended complaint on the

expenses of the theatre; also that some of the expenses of this litigation had been paid by the theatre corporation and that all of these expenses should be paid by Gussman, personally, and not by the theatre. The master refused to recommend that a receiver be appointed.

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Plaintiff has appealed from the decree, except as to that part which orders the return of the bonus money, and defendants appeal from that part of the decree and also from that part which refused to dismiss plaintiff's amended complaint on the



ground that he came into court with unclean hands and has failed to establish any right to relief in equity.

Defendants argue that in the report of the corporate Federal income tax, fictitious salaries were given; that plaintiff, as treasurer of the theatre corporation, participated in making these "fictitious returns" for the purpose of defrauding the Federal Government, and hence does not come into this court with clean hands and his complaint for this reason should be dismissed. To this the plaintiff replies that these returns were prepared by the theatre's accountant, Wallace Mayer; that Sussman cannot raise that point in defense in this suit. Pomerooy in his Equity Jurisprudence (4th Ed.) vol. 1, § 399, says that the maxim concerning clean hands "is confined to misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties, and arising out of the transaction; it does not extend to any misconduct, however gross, which is unconnected with the matter in litigation...." American University v. Wood, 216 Ill. App. 189, 196, (affirmed in 294 Ill. 186.) The only party who might object to any "fictitious" returns is the Federal Government, and certainly not one who profited thereby. We hold that the chancellor was right in deciding that such returns, even if fictitious, did not prevent plaintiff from seeking in a court of equity such relief as he thought himself to be entitled.

The chancellor properly sustained the objections to the finding of the master that \$150 a week was a reasonable salary for Sussman. There was evidence that plaintiff consented and approved the salaries paid to Sussman, beginning with November 1931. Plaintiff at that time, at a meeting of the board of directors, voted for and agreed to a salary of \$200 a week for Sussman as president and manager for the year 1932; and again

ground that he came into court with unclean hands and was failed to establish any right to relief in equity.

Defendants argue that in the report of the corporation Federal income tax, fictitious salaries were given; that plaintiff, as treasurer of the theatre corporation, participated in making these "fictitious returns" for the purpose of obtaining the Federal Government, and hence does not come into this court with clean hands and his complaint for this reason should be dismissed. To this the plaintiff replies that those returns were prepared by the theatre's accountant, Wallace Sawyer; that Guzman cannot raise that point in defense in this suit. Brown in his Equity Jurisprudence (4th Ed., vol. 1, § 392, says that the maxim concerning clean hands "is confined to misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties, and arising out of the transaction; it does not extend to any misconduct, however gross, which is unconnected with the matter in litigation....". American University v. Wood, 216 Ill. App. 182, 183, (affirmed in 294 Ill. 188). The only party who might object to any "fictitious" returns is the Federal Government, and certainly not one who profited thereby. We hold that the chancellor was right in deciding that such returns, even if fictitious, did not prevent plaintiff from seeking in a court of equity such relief as he thought himself to be entitled.

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at the next annual meeting he voted for and agreed to a salary of \$300 a week for Sussman for the year 1933. He is now estopped from asking for an accounting with respect thereto. Klein v. Independent Brewing Ass'n., 231 Ill. 594, 616-617; Figge v. Bergenthal, 130 Wis. 594, 618-619, and other cases.

Evidence was taken before the chancellor as to the reasonableness of salaries for managing theatres. Whether this is proper practice where the matter has been heard before the master and he has made up his report, has not been discussed and we do not pass upon it. Central Ill. Service Co. v. Swartz, 284 Ill. 108; Barrows v. Connelly, 199 Ill. App. 448; Wall v. Stapleton, 177 Ill. 357.

Moreover, the court should not undertake to fix the salary of a corporate officer unless such salary is so palpably excessive as to work a fraud on the stockholders. Sussman gave almost all of his time to the management of the theatre, working on an average of 12 hours a day for 7 days in the week - booking films, supervising the house staff and deciding all the operating policies. As a result of Sussman's industrious efforts the value of a share of stock, which was \$50 in 1931 when plaintiff bought his interest in the corporation, increased until in December 1937 a share of stock was valued at \$304.

The record shows that in the latter part of 1935 Sussman told plaintiff he did not want him around the theatre any more, and in the year 1936 plaintiff did not spend any of his time there. At an annual meeting of the board of directors in October 1936 a resolution was passed removing plaintiff from the office of secretary and treasurer over his protest.

Sussman testified that he paid himself a bonus of \$1500 for 1936 but did not know how it was computed, and that this bonus was paid by authority of a directors' meeting. When any director who actually controls a board assumes to vote himself

-4-

at the next annual meeting he voted for and was elected a director of \$300 a week for Guesman for the year 1936. He is now being sued from asking for an accounting with respect thereto. Wain v. Independent Brewing Ass'n, 231 Ill. 524, 618-617; Wain v. Berenthal, 130 Wis. 594, 618-619, and other cases.

Evidence was taken before the commission as to the reasonableness of salaries for managing theatres. Whether this is proper practice where the matter has been heard before the master and he has made up his report, has not been discussed and we do not pass upon it. Central Ill. Service Co. v. Swartz, 284 Ill. 108; Barrow v. Connelly, 199 Ill. App. 448; Wain v. Stapleton, 177 Ill. 357.

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Guesman testified that he paid himself a bonus of \$1500 for 1936 but did not know how it was computed, and that this bonus was paid by authority of a directors' meeting. When any director who actually controls a bonus assumes to vote therefor

a bonus, a chancery court will, at the instance of any stockholder, set aside the transaction whether it was fair or unfair, Higgins v. Lansingh, 154 Ill. 501, 365-366. In Globe Woolen Co. v. Utica Gas & Electric Co., 224 N. Y. 483, it was held that the duty rests on a trustee to seek no harsh advantage, and cited Adams v. Burke, 201 Ill. 395, where it was said that where a chief stockholder induced his "dummies" to vote a large sum of money to him, this was the act of the chief stockholder and the action may be defeated in court. Many other cases are to the same effect, all of which support the action of the chancellor in decreeing that the bonus be returned to the corporation.

In plaintiff's briefs there is a suggestion that he was entitled to \$5200 salary for 1935, and that one-fourth of an alleged debt of \$4474.14 of Sussman to the corporation should be decreed to be paid directly to the plaintiff. The report of the master makes no finding as to these points and plaintiff filed no objection to this, except the general objection that the master erred in failing to find that Sussman's personal indebtedness to the theatre corporation should be returned to the corporation. There are also other general objections alleging that the master erred in failing to find that Suseman was incompetent and dishonest in the management of the theatre. These points are not argued.

The court properly ordered that the costs of the suit be taxed one-half against the plaintiff and one-half against the defendants.

The decree is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

a bonus, a chancery court will, at the instance of any stockholder, set aside the transaction whether it was fair or unfair. Higgins v. Linsalata, 164 Ill. 301, 368-369. In Shore Hotel Co. v. Utica Gas & Electric Co., 204 N. Y. 483, it was held that the duty rests on a trustee to seek no personal advantage, and after Adams v. Burke, 201 Ill. 395, where it was said that where a chief stockholder induced his "dummy" to vote a large sum of money to him, this was the act of the chief stockholder and the action may be defeated in court. Many other cases are to the same effect, all of which support the action of the chancery in decreeing that the bonus be returned to the corporation.

In plaintiff's brief there is a suggestion that he was entitled to \$2000 salary for 1915, and that one-fourth of an alleged debt of \$474.14 of Sussman to the corporation should be decreed to be paid directly to the plaintiff. The report of the master makes no finding as to these points and plaintiff filed no objection to this, except the general objection that the master erred in failing to find that Sussman's personal indebtedness to the theatre corporation should be returned to the corporation. There are also other general objections alleging that the master erred in failing to find that Sussman was incompetent and dishonest in the management of the theatre. These points are not argued.

The court properly ordered that the costs of the suit be taxed one-half against the plaintiff and one-half against the defendants.

The decree is affirmed.

APPROVED.

Mathews and O'Connor, JJ., concur.

41888

HERSCHEL H. CAMPBELL,  
Appellee,

v.

CHICAGO, BURLINGTON & QUINCY  
RAILROAD COMPANY, a corporation,  
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

314 I.A. 384

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$15,000, entered upon the verdict of a jury in an action brought by plaintiff to recover damages for personal injuries sustained by him as the result of a collision between his automobile, which he was driving, and a freight train operated over defendant's tracks in Centralia, Illinois.

This is the second trial of this case. In the first trial the judgment in plaintiff's favor was for \$20,000. On appeal by defendant we reversed this and remanded the cause on the ground the verdict was against the manifest weight of the evidence. (305 Ill. App. 264.) In that opinion we described in detail the physical situation and the accident which happened about 10 o'clock in the evening of August 24, 1935. The freight train was going south at from 8 to 12 miles an hour; plaintiff was driving his automobile east on 5th street in Centralia; there was a collision between the two.

Plaintiff's complaint charged that the locomotive of the train was without any headlight; that no signal was given either by bell or whistle as it approached the 5th street crossing. In our former opinion we noted that there was conflicting evidence on these points and concluded that the finding of the jury that plaintiff was in the exercise of due care for his own safety and that defendant was guilty of negligence was against the manifest weight of the evidence. It is unnecessary to repeat what we said in that opinion.

HERSCHEL H. CAMPBELL,  
Appellee,

v.

CHICAGO, BURLINGTON & QUINCY  
RAILROAD COMPANY, a corporation,  
Appellant.

MR. PRESIDING JUSTICE MORRIS delivered the opinion of the court.

Defendant appeals from a judgment for \$18,000, entered upon the verdict of a jury in an action brought by plaintiff to recover damages for personal injuries sustained by him as the result of a collision between his automobile, which he was driving, and a freight train operated over defendant's tracks in Centralia, Illinois.

This is the second trial of this case. In the first trial the judgment in plaintiff's favor was for \$80,000. On appeal by defendant we reversed this and remanded the cause on the ground the verdict was against the manifest weight of the evidence. (305 Ill. App. 284.) In that opinion we described in detail the physical situation and the accident which happened about 10 o'clock in the evening of August 24, 1935. The freight train was going south at from 8 to 12 miles an hour; plaintiff was driving his automobile east on 5th street in Centralia; there was a collision between the two.

Plaintiff's complaint charged that the locomotive of the train was without any headlight; that no signal was given either by bell or whistle as it approached the 5th street crossing. In our former opinion we noted that there was conflicting evidence on these points and concluded that the finding of the jury that plaintiff was in the exercise of due care for his own safety and that defendant was guilty of negligence was against the manifest weight of the evidence. It is unnecessary to repeat what we said in that opinion.



On the second trial the same witnesses testified for the plaintiff who testified on the prior trial and, with some slight differences, their evidence was virtually the same. An additional witness was produced by plaintiff at this trial but his testimony does not materially help plaintiff's case. He testified he was walking south on the west side of Chestnut street and when he reached a point about 150 feet north of 5th street he heard the rumbling noise of the train coming behind him; he turned and saw it when it was about 50 feet away; he saw plaintiff's automobile stop at the stop sign. This stop sign was 30 feet away from the track, and plaintiff himself testified that, looking north from where he stopped he could see at least 50 feet, and yet when he was about 10 feet from the track he shifted to second speed and then saw the engine, which was 10 or 12 feet from him. Plaintiff does not explain his failure to look north after he left the stop sign.

In addition to the witnesses who testified at the first trial that the whistle was sounding, the bell ringing and the headlight of the locomotive burning, three more witnesses were produced by defendant who said they saw the headlight burning and heard both the whistle and bell. We hold that in this second trial the manifest weight of the evidence is that the bell rang, the whistle sounded and the headlight was burning. The evidence to the contrary was largely negative in character. Provenzano v. I. C. R. Co., 357 Ill. 192, 196.

The instructions given by the court were virtually the same as those given on the first trial. As we said in our prior opinion, there was no substantial error in these.

Counsel for defendant argue earnestly that the trial court should have directed the jury to return a verdict for the defendant and that it was error to deny its motion at the close

On the second trial the same witness testified for the plaintiff who testified on the first trial and, with some slight differences, their evidence was virtually the same. An additional witness was produced by plaintiff at this trial but his testimony does not materially help plaintiff's case. He testified he was walking south on the west side of Chestnut street and when he reached a point about 150 feet north of 5th street he heard the rumbling noise of the train coming behind him; he turned and saw it when it was about 50 feet away; he saw plaintiff's automobile stop at the stop sign. This stop sign was 30 feet away from the track, and plaintiff himself testified that, looking north from where he stopped, he could see at least 50 feet, and yet when he was about 10 feet from the track he shifted to second speed and then saw the engine, which was 10 or 12 feet from him. Plaintiff does not explain his failure to look north after he left the stop sign.

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Provenzano v. I. O. R. Co., 257 Ill. 122, 123, 124.

The instructions given by the court were virtually the same as those given on the first trial. As we said in our prior opinion, there was no substantial error in these.

Counsel for defendant argue earnestly that the trial court should have directed the jury to return a verdict for the defendant and that it was error to deny its motion at the close

of all the evidence to direct such a verdict. In view of the conflict in the evidence and of what we said in our former opinion the trial court could not have directed a verdict without weighing the variant testimony, and therefore properly left the facts to be determined by the jury. This court is also in the same position on this point and cannot remand with directions to the trial court to direct a verdict.

However, we are again of the opinion that the verdict is so manifestly against the weight of the evidence that the judgment must be reversed and the cause remanded for another trial, and it is so ordered.

REVERSED AND REMANDED.

Matchett and O'Connor, JJ., concur.

of all the evidence to direct such a verdict. In view of the conflict in the evidence and of what we said in our former opinion the trial court could not have directed a verdict without weighing the variant testimony, and therefore properly left the issue to be determined by the jury. This court is also in the same position on this point and cannot remand with directions to the trial court to direct a verdict.

However, we are again of the opinion that the verdict is so manifestly against the weight of the evidence that the judgment must be reversed and the cause remanded for another trial, and it is so ordered.

REVEREND AND HIS HONOR.

Matchett and O'Connor, JJ., concur.

41905

FRANK KLOVAS,  
Appellee,  
  
v.  
  
STEVE WEDESKIS,  
Appellant.

APPEAL FROM  
  
MUNICIPAL COURT  
  
OF CHICAGO.

314 I.A. 384<sup>2</sup>

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment for \$2,621 by confession on a note alleged to be signed by the defendant; on the same day garnishment proceedings were commenced against the Drovers Trust & Savings Bank and a judgment was entered against the garnishee on the answer of the bank for \$2,416.62, which was the amount defendant had to his credit in the bank.

Defendant moved the court to vacate the judgment against him and leave was granted to appear and defend. Two main defenses were presented, namely, that the signature on the note on which judgment by confession was entered was not his signature; that he was not indebted to the plaintiff in any sum whatever, and that even if the court should hold the signature was not forged, the evidence would show that the note was wholly without any good and valuable consideration.

Upon trial by the court without a jury both these issues were found against the defendant and the judgment against him by confession was affirmed. He appeals.

We are of the opinion that the manifest weight of the evidence supports both of these defenses.

Touching first on the defense of no consideration: Defendant lived with plaintiff and his wife for many years as a roomer and boarder; he was employed for a time by Armour & Co., and later by Wilson & Co., earning about \$30 a week; for about the first seven months of 1933 he was ill and did not work, and plaintiff says that the note, which is dated January 16, 1934,

41305

FRANK KLOVAS,  
Appellee,

v.

STEVE KEDNICKIS,  
Appellant.

CHICAGO, ILL.  
JANUARY 16, 1934.

MR. PRESIDING JUSTICE MCKENNA DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment for \$2,500 by confession on a note alleged to be signed by the defendant; on the same day garnishment proceedings were commenced against the Drovers Trust & Savings Bank and a judgment was entered against the garnishee on the answer of the bank for \$2,416.88, which was the amount defendant had to his credit in the bank.

Defendant moved the court to vacate the judgment against him and leave was granted to appear and defend. Two main defenses were presented, namely, that the signature on the note on which judgment by confession was entered was not his signature; that he was not indebted to the plaintiff in any sum whatever, and that even if the court should hold the signature was not forged, the evidence would show that the note was wholly without any good and valuable consideration.

Upon trial by the court without a jury both these defenses were found against the defendant and the judgment against him by confession was affirmed. He appeals.

We are of the opinion that the slightest weight of the

evidence supports both of these defenses.

Touching first on the defense of no consideration: Defendant lived with plaintiff and his wife for many years as a roomer and boarder; he was employed for a time by Armour & Co., and later by Wilson & Co., earning about \$30 a week; for about the first seven months of 1933 he was ill and did not work, and plaintiff says that the note, which is dated January 16, 1934,

was given in payment for defendant's room and board during this time. Defendant testified that he paid plaintiff and his wife for his board and lodging during all of this time.

In August 1932 defendant had on deposit in the savings account of the Peoples National Bank & Trust Co., \$2,182.24; in June 1934, ~~before the date of the note in question,~~ defendant opened up another savings account in the Drovers Trust & Savings Bank with an initial deposit of \$650. This account was increased from time to time until in April 1940 it amounted to \$3,016.62. Both plaintiff and his wife knew of this savings account. Defendant says that about this time he was sick and thought he was going to die; that without any request on his part a lawyer came to see him and secured his signature to two papers. One of these was apparently a will, in which defendant left to plaintiff and his wife the larger part of his property. There is reason to believe that the other paper signed was a withdrawal slip directed to the Drovers bank authorizing it to turn over defendant's balance to plaintiff and his wife.

Plaintiff and his wife secured defendant's Drover bank account of \$3,016.62, but subsequently defendant repudiated this transaction and brought suit in the Municipal court to recover from them this amount with interest at 5 per cent. Thereupon they returned to defendant the principal sum. He later filed an amended statement of claim for interest from the time his money was withheld from him, together with attorney's fees. He also sought to recover moneys claimed to be loaned by him to plaintiff and his wife amounting to \$500, and gave them certain credits. Later, defendants in that case - Klovas and his wife, failing to answer, a judgment was entered against them in favor of defendant here - Wedeskis, for \$332.80.

was given in payment for defendant's room and board during this time. Defendant testified that he paid plaintiff and his wife for his board and lodging during all of this time.

In August 1932 defendant had on deposit in the savings account of the Peoples National Bank & Trust Co., \$2,182.24; in

June 1934, ~~xxxxxx~~ defendant opened up another savings account in the Drovers Trust & Savings Bank with an initial deposit of \$880. This account was increased from time to time until in April 1940 it amounted to \$8,016.62.

Both plaintiff and his wife knew of this savings account. Defendant says that about this time he was sick and thought he was going to die; that without any request on his part a lawyer came to see him and secured his signature to two papers. One of these was apparently a will, in which defendant left to plaintiff and his wife the larger part of his property. There is reason to believe that the other paper signed was a withdrawal slip directed to the Drovers bank authorizing it to turn over defendant's balance to plaintiff and his wife.

Plaintiff and his wife secured defendant's Drovers bank account of \$8,016.62, but subsequently defendant repudiated this transaction and brought suit in the Municipal court to recover from them this amount with interest at 6 per cent. Thereupon they returned to defendant the principal sum. He later filed an amended statement of claim for interest from the time his money was withheld from him, together with attorney's fees. He also sought to recover moneys claimed to be loaned by him to plaintiff and his wife amounting to \$500, and gave them certain credits. Later, defendants in that case - Kloves and his wife, failing to answer, a judgment was entered against them in favor of defendant here - Wedekind, for \$332.80.



Counsel for defendant in his brief suggest that the trial court did not give sufficient weight to the defense of no consideration, and a remark made by the court would seem to afford some basis for this.

The note in question is dated January 16, 1934, and is for the face value of \$1,800, with interest at 6 per cent; at that time defendant had on deposit with the Peoples bank over \$2,000 and had opened an account with the Drovers bank which, as we have said, by April 1940 amounted to over \$3,000. Although plaintiff and his wife knew that defendant had these savings accounts, yet for over 6 and 1/2 years they made no demand on him for any indebtedness due on the note, or otherwise.

It is significant that it was not until after defendant had commenced suit in August 1940 to recover his money that the judgment by confession was entered against him on October 2, 1940. Moreover, in his suit against the Klovases in the Municipal court they were charged with having fraudulently obtained defendant's signature to the withdrawal slip on his bank. The return to defendant of the principal amount obtained by them, and the default judgment against them for the balance, was virtually an admission that the charges made in that suit were justified. Defendant, after recovering the money back from Klovases and his wife, redeposited the same in the Drovers bank from which it had been withdrawn by the Klovases', and it is that bank which plaintiff garnished. It is persuasively pointed out that if defendant had any knowledge at that time that plaintiff was holding his note or claiming that defendant owed him anything, <sup>and he wished to avoid payment,</sup> he would have deposited the money in another bank and not have informed plaintiff of this.

Although Klovases' wife and also her son testified that defendant was sick and out of work for a period of between 12 and

-2-

Counsel for defendant in his brief in support of his motion for judgment notwithstanding the verdict, and a remark made by the court would seem to afford some basis for this.

The note in question is dated January 18, 1940, and is for the face value of \$2,000, with interest at 3 per cent; at that time defendant had on deposit with the Peoples Bank over \$2,000 and had opened an account with the Provera Bank when, as we have said, by April 1940 amounted to over \$3,000. Although plaintiff and his wife knew that defendant had these savings accounts, yet for over 6 and 1/2 years they made no demand on him for any indebtedness due on the note, or otherwise.

It is significant that it was not until after defendant had commenced suit in August 1940 to recover his money that the judgment by confession was entered against him on October 1, 1940. Moreover, in his suit against the Klovas in the Municipal Court they were charged with having fraudulently obtained defendant's signature to the withdrawal slip on his bank. The return to defendant of the principal amount obtained by them, and the default judgment against them for the balance, was virtually an admission that the charges made in that suit were justified.

Defendant, after recovering the money back from Klovas and his wife, redeposited the same in the Provera Bank from which it had been withdrawn by the Klovas, and it is that bank which plaintiff garnished. It is persuasively pointed out that if defendant had any knowledge at that time that plaintiff was holding the note or claiming that defendant owed him anything, he would have deposited the money in another bank and not have informed plaintiff of this.

Although Klovas' wife and also her son testified that defendant was sick and out of work for a period of between 12 and

18 months and paid nothing for board and lodging during this time, yet the more convincing evidence is that defendant, at most, was unemployed for about 7 months, and on the basis of plaintiff's own figures of \$40 per month for board and lodging, defendant could only have owed them \$280 for this period of unemployment. Defendant testified that during all of this period he paid for his board and lodging. He admitted he owed for a period of six months in 1940, for which he gave them credit of \$180 in his suit against them in the Municipal court.

Mr. Rounds, a handwriting expert, gave his opinion that the signature on the note in question was not the signature of the defendant but was a forgery. He presented photographed enlarged genuine signatures of the defendant and also the signature on the note which are in the record. He pointed out with great detail facts to support his conclusion that the signature on the note was a forgery.

Plaintiff also introduced an expert, who gave it as his opinion that the signatures which were admittedly genuine and that on the note were written by the same person. However, his testimony is less convincing than that of the expert who testified to the contrary. The expert for plaintiff testified that "I have made rather an informal examination here, \*\* My examination in here is simply a preliminary one, I only had the time that you saw me in the back there." Compared with the detailed and definite testimony of the expert presented by defendant the greater weight of the evidence supports defendant's claim that the signature on the note was not made by him.

Plaintiff in his brief renews his motion, which has twice been denied by this court, to dismiss the appeal on the ground that no attempt was made to file the report of the proceedings within 50 days after the filing of notice of appeal. The notice of appeal was filed April 4, 1941. Fifty days from that date

18 months and paid nothing for board and lodging during this time, yet the more convincing evidence is that defendant, at most, was unemployed for about 7 months, and on the basis of Plaintiff's own figures of \$40 per month for board and lodging, defendant could only have owed them \$280 for this period of unemployment. Defendant testified that during all of this period he paid for his board and lodging. He admitted he owed for a period of six months in 1940, for which he gave them credit of \$180 in his suit against them in the Municipal court. Mr. Rounds, a handwriting expert, gave his opinion that the signature on the note in question was not the signature of the defendant but was a forgery. He presented photographs enlarged genuine signatures of the defendant and also the signatures on the note which are in the record. He pointed out with great detail facts to support his conclusion that the signature on the note was a forgery. Plaintiff also introduced an expert, who gave it as his opinion that the signatures which were allegedly genuine and that on the note were written by the same person. However, his testimony is less convincing than that of the expert who testified to the contrary. The expert for Plaintiff testified that "I have made rather an informal examination here. My examination in here is simply a preliminary one. I only had the time that you saw me in the back there." Compared with the detailed and definite testimony of the expert presented by defendant the greater weight of the evidence supports defendant's claim that the signature on the note was not made by him.

Plaintiff in his brief renews his motion, which has twice been denied by this court, to dismiss the appeal on the ground that no attempt was made to file the report of the proceedings within 60 days after the filing of notice of appeal. The notice of appeal was filed April 4, 1941. Fifty days from that date

would be May 24, 1941. The Civil Practice act provides that an extension of time for filing the report may be made within the 50 days, and the record shows that such an extension was made on May 23, which was within the 50 days. We see no reason to change our opinion on the motions to dismiss the appeal.

Plaintiff says this court cannot consider the sufficiency of the evidence because no exceptions were taken to the entry of the judgment. Under §80 of the Civil Practice act such exceptions are not necessary. See also Travelers Ins. Co. v. Wagner, 279 Ill. App. 13.

We hold that the finding of the trial court was against the manifest weight of the evidence, and as the trial was by the court without a jury the judgment will be reversed without remanding.

REVERSED.

Matchett and O'Connor, JJ., concur.

would be May 24, 1941. The Civil Practice act provides that an extension of time for filing the report may be made within the 60 days, and the record shows that such an extension was made on May 23, which was within the 60 days. We see no reason to change our opinion on the motion to dismiss the appeal.

Plaintiff says this court cannot consider the sufficiency

of the evidence because no exceptions were taken to the entry of the judgment. Under §80 of the Civil Practice act such exceptions are not necessary. See also Travelers Ins. Co. v. Warner, 273 Ill. App. 13.

We hold that the finding of the trial court was against the manifest weight of the evidence, and as the trial was by the court without a jury the judgment will be reversed without re-

manding.

REVEREND.

Macchett and O'Connor, JJ., concur.

41951

AMERICAN EXPORT LINES, INC.,  
a corporation,  
Appellant,

v.

THE FIRST NATIONAL BANK OF  
CHICAGO, a corporation,  
Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

314 I.A. 385

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment in favor of the defendant in an action brought to recover \$2,285, alleging that defendant had paid this amount on a check which was payable to plaintiff on which the endorsement of its name had been forged by J. A. Henning, its agent.

The facts in this case are very much like those in Miller v. American Export Lines, Inc., 307 Ill. App. (abst.) 234. In that case, as here, the American Export Lines claimed that Henning had no authority to endorse a check which was made payable to it. There we did not pass upon this question as the evidence showed that Henning had sent to his employer virtually all of the money he had received from the check, and we affirmed the judgment against the American Export Lines.

In the instant case Henning received the check from the Chicago Motor Club, payable to plaintiff; Henning endorsed this and gave it to Thos. Cook & Son in exchange for 22 traveler's checks - each for \$100, and \$85 in cash. The Anspach Travel Bureau had previously given Henning a check for \$930 for advance traveling reservations and he had forwarded these funds to the New York office of plaintiff; subsequently these reservations were canceled and the Anspach agency asked for a refund; this was made by Henning through the proceeds of the Chicago Motor Club check in question, in the amount of \$930.

Another \$800 of the Cook traveler's checks were used to

AMERICAN EXPORT LINE, INC.,  
a corporation,  
Appellant,

v.

THE FIRST NATIONAL BANK  
OF CHICAGO, a corporation,  
Appellee.

MR. PRESIDING JUSTICE ROBERTS delivered the opinion of the court.

Plaintiff appeals from a judgment in favor of the defendant in an action brought to recover \$2,385, alleging that defendant had paid this amount on a check which was payable to plaintiff on which the endorsement of its name had been forged by J. A. Henning, its agent.

The facts in this case are very much like those in Miller v. American Export Lines, Inc., 307 Ill. 504, (1934), in that case, as here, the American Export Lines claimed that Henning had no authority to endorse a check which was payable to it. There we did not pass upon this question. The evidence showed that Henning had sent to his employer virtually all of the money he had received from the check, and we affirmed the judgment against the American Export Lines.

In the instant case Henning received the check from the Chicago Motor Club, payable to plaintiff; Henning endorsed this and gave it to those Cook & Son in exchange for 32 travelers' checks - each for \$100, and 85 in cash. The Annapolis Bureau had previously given Henning a check for \$970 for advance traveling reservations and he had forwarded these funds to the New York office of plaintiff; subsequently these reservations were canceled and the Annapolis agency asked for a refund; this was made by Henning through the proceeds of the Chicago Motor Club check in question, in the amount of \$970.

Another \$800 of the Cook & Son's checks were used to



purchase a money order for \$731, which Henning transmitted to plaintiff. The uncontradicted testimony shows that the balance of these Cook checks were used to pay the necessary and proper expenses of plaintiff's western passenger office which was in charge of Henning.

In an early Illinois case (Shaffner v. Edgerton, 13 Ill. App. 132,) it was held that even if an agent had no authority to endorse certain checks, yet if the amount of these was received by plaintiffs they will not be permitted to allege his want of authority. In Hamlin's Wizard Oil Co. v. U. S. Express Co., 184 Ill. App. 493, (affirmed in 265 Ill. 156), it was held that where the plaintiff actually got the benefit of certain checks and drafts, the defendant should be credited with them although they were bought with part of stolen proceeds.

Although what we have said justifies affirmance of the judgment, we might also say that defendant and Thos. Cook & Son had a right to rely upon the authority of Henning to endorse the check. He was the general passenger agent of plaintiff with headquarters in Chicago, soliciting passenger business for plaintiff; he planned complete itineraries, made hotel reservations, arranged for land transportation and purchasing of traveler's checks. To furnish these services to the traveling public he had authority to receive payments either in cash or by checks. His method of business was ordinarily to endorse checks payable to plaintiff with a rubber stamp, adding his own signature.

Henning's territory covered 21 states, and in securing business it was necessary for him to travel frequently. He was constantly complaining to the home office that there was not sufficient money allowed to him for these traveling expenses. Plaintiff ascertained that Henning was using for this purpose moneys which should have been forwarded to it, and on April 28,

purchase a money order for \$100, which amounting to the balance of these Cook checks were used to pay the necessary and proper expenses of plaintiff's western passenger office which are in charge of Henning.

In an early Illinois case (Chaffin v. Chaffin, 10 Ill. App. 128), it was held that even if an agent had no authority to endorse certain checks, yet if the amount of same was received by plaintiff they will not be permitted to allege his want of authority. In Hamling v. Hamling, 10 Ill. App. 493, (affirmed in 205 Ill. 138), it was held that where the plaintiff actually got the benefit of certain checks and drafts, the defendant should be credited with them although they were bought with part of stolen proceeds.

Although what we have said justifies affirmation of the judgment, we might also say that defendant and those who had a right to rely upon the authority of Henning to endorse the check. He was the General Passenger Agent of plaintiff with headquarters in Chicago, soliciting passenger business for plaintiff; he planned complete itineraries, made hotel reservations, arranged for land transportation and purchasing of traveler's checks. To furnish these services to the traveling public he had authority to receive payments either in cash or by checks. His method of business was ordinarily to endorse checks payable to plaintiff with a rubber stamp, adding his own signature. Henning's territory covered 21 states, and in securing business it was necessary for him to travel frequently. He was constantly complaining to the home office that there was not sufficient money allowed to him for these traveling expenses. Plaintiff ascertained that Henning was using for this purpose moneys which should have been forwarded to it, and on April 25,

1937, wrote him a letter directing him to remit directly to plaintiff's New York office all checks received by him. There is no evidence that Thos. Cook & Son or the defendant, First National Bank, ever had any knowledge of these instructions, and Henning testified that even after receipt of the letter he continued to operate the business, handling the funds exactly as he had been doing previously for years.

It has been held in many cases that secret instructions limiting the authority of an agent are not binding on one who has had dealings with the agent who was exercising powers within the apparent scope of his authority. Hodges v. Bankers Surety Co., 152 Ill. App. 372; Swisher v. Palmer, 106 Ill. App. 432, 436-437; Irvin v. Metropolitan-Hibernia Fire Ins. Co., 247 Ill. App. 562, 570; Home Life Ins. Co. v. Pierce, 75 Ill. 426, 435. The facts as to Henning's apparent authority were properly submitted to the jury.

Plaintiff criticizes certain of the instructions, but we find nothing of sufficient importance to require a reversal.

The evidence sustains the verdict, and the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

The evidence sustains the verdict, and the defendant is  
affirmed.

Matchett and O'Connor, 37, County

41929

LAKE VIEW TRUST AND SAVINGS BANK, a  
corporation,

Appellee,

v.

CITY OF CHICAGO, a Municipal Corporation,  
Appellant.

30  
22  
APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

314 I.A. 386<sup>1</sup>

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

February 9, 1934, plaintiff filed suit against defendant to recover \$25,530.64, balance said to be due upon a judgment rendered in a condemnation suit with interest. Defendant filed an answer March 28, 1934. November 6, 1936, an order was entered dismissing the suit. In March, 1941, plaintiff, under Section 72 of the Civil Practice Act, filed its petition in the nature of a motion for writ of error coram nobis to vacate the order of dismissal. The ground of the motion was stated by the petition to be that after suit was filed it was found a case was pending in the Supreme Court which involved the same question and the decision of which would finally determine whether plaintiff was entitled to recover in this suit. In view of this case the attorneys for plaintiff entered into an oral stipulation with the attorneys for defendant that if this case appeared on any trial call before the decision of the Supreme Court in the case there pending it should be stricken from the call, and further that judgment finally would be entered in the trial court in conformity with whatever the decision of the Supreme Court might be in the test case. November 6, 1936, the case appeared on a call of cases in the Circuit Court made under Section 5 of Rule 22, concerning cases not noticed for trial within two years after the beginning thereof. Each of the parties relied upon the oral stipulation. Neither appeared, and the suit was dismissed. Thereafter the test case in the Supreme Court was decided in favor of plaintiff. Upon the filing of this petition defendant made a

LAKE VIEW TRUST AND SAVINGS BANK,  
Appellee,

vs.

CITY OF CHICAGO, a Municipal Corporation,  
Appellant.

MR. JUSTICE MATHESON delivered the opinion of the court.

February 9, 1934, plaintiff filed suit against defendant

to recover \$25,530.84, balance said to be due upon a judgment rendered in a condemnation suit with interest. Defendant filed an answer March 28, 1934. November 6, 1936, an order was entered dismissing the suit. In March, 1941, plaintiff, under section 72 of the Civil Practice Act, filed its petition in the nature of a motion for writ of error coram nobis to vacate the order of dismissal. The ground of the motion was stated by the petition to be that after suit was filed it was found a case was pending in the Supreme Court which involved the same question and the decision of which would finally determine whether plaintiff was entitled to recover in this suit. In view of this case the attorneys for plaintiff entered into an oral stipulation with the attorneys for defendant that if this case appeared on any trial call before the decision of the Supreme Court in the case there pending it should be stricken from the call, and further that judgment finally would be entered in the trial court in conformity with whatever the decision of the Supreme Court might be in the test case. November 6, 1936, the case appeared on a call of cases in the Circuit Court made under Section 5 of Rule 26, concerning cases not noticed for trial within two years after the beginning thereof. Each of the parties relied upon the oral stipulation. Neither appeared, and the suit was dismissed. Thereafter the test case in the Supreme Court was decided in favor of plaintiff. Upon the filing of this petition defendant made a

motion to dismiss it. The motion was denied, the order of dismissal set aside and defendant appeals.

The petition showed the dismissal of a good cause of action because of a matter which, had it been called to the attention of the trial judge, would undoubtedly have prevented the entry of the order. On the authority of cases such as Jacobson v. Ashkinaze, 337 Ill. 141; Carsted v. Mills Novelty Co., 298 Ill. App. 275; Maniatis v. Carelin, 287 Ill. App. 154, and numerous other cases which might be cited, we hold the petition was sufficient and the court was justified in entering an order denying defendant's motion to dismiss it. The order reinstating the cause, however, further states that leave is denied defendant to file an answer to said petition. The filing of the petition was the beginning of a new suit. When the motion to dismiss it was denied defendant had a right to answer. (See Ill. Civil Practice Act, Chap. 110, §45; Hinton's Comment on Section 45 in Harrow's Ill. Practice Manual, p. 147, and the decision of the Appellate Court in Topel v. Personal Loan & Savings Bank, 290 Ill. App. 558).

For the error in denying defendant's right to answer the petition the judgment must be reversed and the cause remanded with directions to enter a rule on the defendant to answer the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and O'Connor, J., concur.

motion to dismiss it. The court has ruled, however, that the  
 mineral set aside and defendant's liability.

The petition showed the dismissal of a good cause of  
 action because of a matter which, had it been called to the  
 attention of the trial judge, would undoubtedly have prevented  
 the entry of the order. On the authority of cases such as Leopold  
son v. Ashburne, 337 Ill. 141; Quoted v. M. J. K. v. M. J. K.,  
 338 Ill. App. 375; Wanalis v. Gershin, 337 Ill. App. 144, and  
 numerous other cases which might be cited, we hold the petition  
 was sufficient and the court was justified in entering an order  
 denying defendant's motion to dismiss it. The order maintaining  
 the cause, however, further states that leave is denied defendant  
 to file an answer to said petition. The filing of the petition  
 was the beginning of a new suit. When the motion to dismiss it  
 was denied defendant had a right to answer. (See Ill. Civil  
 Practice Act, Chap. 110, § 147; Harrow's Comment on Section 45 in  
 Harrow's Ill. Practice Manual, p. 147, and the decision of the  
 Appellate Court in Topel v. Personal Loan & Savings Bank, 290  
 Ill. App. 223).

For the error in denying defendant's right to answer the  
 petition the judgment must be reversed and the cause remanded  
 with directions to enter a rule on the defendant to answer the  
 petition.

REVEREND AND HONORABLE JUDGES:

McGurney, P. J., and O'Connor, J., concur.



41948

SCHLOSSER'S BAKERIES, INC., a  
corporation, and LOUIS SCHLOSSER,  
Appellants,

v.

VILLAGE OF OAK PARK, a Municipal  
corporation, ROBERT F. McMASTER,  
President, and BENJAMIN BARSEMA,  
Chief of Police, of the Village  
of Oak Park,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

314 I.A. 386<sup>2</sup>

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiffs, doing business in bakery goods in Chicago, opened a retail store in Oak Park. The corporation owned the business. Louis Schlosser was president of it. The store was kept open on Sundays, and its officials came in conflict with the village ordinance 75.46 of the Village Code, known as the Sunday Closing Ordinance. April 1, 1941, the chief of police caused a complaint to be filed against Louis Schlosser for violating the ordinance. A warrant issued, bond was given, trial set for April 4, 1941.

The day before the time set for trial (April 3) plaintiffs began this suit in equity for an injunction to restrain enforcement of the ordinance. The complaint set up the ordinance verbatim and alleged it was void and invalid. Judge Lewé issued a temporary injunction. There was notice of application for change of venue. The cause was transferred to Judge O'Connell. Defendants answered. The cause was heard on the pleadings. A decree was entered July 17, 1941, dissolving the injunction and dismissing the suit for want of equity. Plaintiffs gave notice of appeal July 28, 1941.

The trial judge stated reasons for his decision to be that courts of equity would not interfere by injunction where there was a complete and adequate remedy at law; that repetition of offenses could not justify the argument that equity would

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President, and BENJAMIN BARBERA,  
Chief of Police, of the Village  
of Oak Park,  
Appellees.

MR. JUSTICE MATHESON DELIVERED THE OPINION OF THE COURT.

Plaintiffs, doing business in bakery goods in Chicago, opened a retail store in Oak Park. The corporation owned the business. Louis Schlosser was president of it. The store was kept open on Sundays, and its officials were in conflict with the village ordinance 78.43 of the Village Code, known as the Sunday Closing Ordinance. April 1, 1941, the chief of police caused a complaint to be filed against Louis Schlosser for violating the ordinance. A warrant issued, bond was given, trial set for April 4, 1941.

The day before the time set for trial (April 3) plaintiffs began this suit in equity for an injunction to restrain enforcement of the ordinance. The complaint set up the ordinance verbatim and alleged it was void and invalid. Judges have issued a temporary injunction. There was notice of application for change of venue. The cause was transferred to Judge O'Donnell. Defendants answered. The cause was heard on the pleading. A decree was entered July 17, 1941, dissolving the injunction and dismissing the suit for want of equity. Plaintiffs gave notice of appeal July 28, 1941.

The trial judge stated reasons for his decision to be that courts of equity would not interfere by injunction where there was a complete and adequate remedy at law; that repetition of offenses could not justify the argument that equity would

intervene to prevent a multiplicity of suits. The court distinguished Eden v. The People, 161 Ill. 296 at 303, and City of Mt. Vernon v. Julian, 369 Ill. 447 at 453, on the ground that there the validity of the ordinances in question was tested in direct actions at law, while here the attempt was to challenge the ordinance by complaint in equity. We think the opinion of the trial judge was sound in law.

The cases are rare indeed in which a court of equity will use its extraordinary powers to interfere with officials entrusted with the enforcement of the law. Chicago Public Stock Exchange v. McClaughry, 148 Ill. 372, 380, 381; High on Injunctions, §34; Kent v. City of Chicago, 301 Ill. App. 312, 314.

It is unnecessary on this record to analyze the cases since the record shows that, as a matter of fact, the questions have since the decision of the court become moot. The suit was dismissed July 17. Four days afterwards (on July 21, 1941) the proper authorities of the Village of Oak Park by an ordinance enacted as an amendment in effect repealed the ordinance involved in this suit and substituted for it another in substance quite different. The record in this case was filed August 4, 1941. September 18, 1941, by a paid advertisement in the local Oak Park paper plaintiff corporation stated that an ordinance such as had been passed by way of amendment and substitution "is unquestionably fair \* \* \* we intend to observe this ordinance \* \* \*." A letter to the same effect was distributed under date of September 16, 1941, to practically everybody in Oak Park. All these facts are made to appear from an affidavit filed in this court October 17, 1941, which is now a part of the record. Wick v. Chicago Telephone Co., 277 Ill. 338; Laskey v. Laskey, 226 Ill. App. 566. The affidavit was in support of a motion to dismiss the appeal. Plaintiffs filed counter-suggestions but no affidavit denying

Plaintiffs filed counter-suggestions but no affidavit denying. The affidavit was in support of a motion to dismiss the appeal. Telephone Co., 277 Ill. 338; Lasky v. Lasky, 269 Ill. App. 585. 17, 1941, which is now a part of the record. Rich v. Chicago are made to appear from an affidavit filed in this court October 16, 1941, to practically everybody in Oak Park. All these facts letter to the same effect was distributed under date of September 16, 1941, by a paid advertisement in the local Oak Park paper plaintiff corporation stated that an ordinance such as had been passed by way of amendment and substitution "is unquestion- in this suit and substituted for it another in substance quite enacted as an amendment in effect repealed the ordinance involved proper authorities of the Village of Oak Park by an ordinance dismissed July 17. Four days afterwards (on July 21, 1941) the have since the decision of the court become moot. The suit was since the record shows that, as a matter of fact, the questions It is unnecessary on this record to analyze the case tones, 334; Kent v. City of Chicago, 301 Ill. App. 313, 314. Exchange v. McClanahan, 148 Ill. 575, 580, 581; high on Injunc- entrusted with the enforcement of the law. Chicago Public Stock will use its extraordinary powers to interfere with officials The cases are rare indeed in which a court of equity the trial judge was bound in law.

the ordinance by complaint in equity. We think the opinion of direct actions at law, while here the attempt was to challenge there the validity of the ordinance in question was tested in Mt. Vernon v. Julian, 323 Ill. 447 et 453, on the ground that languished Eden v. The People, 181 Ill. 498 et 501, and City of intervene to prevent a multiplicity of suits. The court dis-

the truth of the statements recited. They attach to their counter-suggestions a letter on their stationery under date of October 8, 1941, addressed to "Dear Mr. and Mrs. Oak Parker", in which it is stated that plaintiffs have caused a survey to be made from which it appears that many retail establishments in Oak Park were violating the recently enacted ordinance. The letter adds: "In the meantime, Schlosser's Bakery at 1145 Lake Street, will continue to observe your wishes by remaining closed on Sundays".

This court will not spend its time in deciding whether the enforcement of an ordinance should be enjoined when it has been repealed and another substituted which plaintiffs have declared their intention to obey. In their counter-suggestions plaintiffs say the complaint also seeks relief against the enforcement of the State Sunday law. Ill. Rev. Stats., 1941, Chap.38, §262, par. 550, p. 1179. It is sufficient to say that on the authorities already cited the validity of that statute cannot be determined by complaint in equity. The order will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

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This court will not spend its time in deciding whether the enforcement of an ordinance should be enjoined when it has been repealed and another substituted which plaintiffs have declared their intention to obey. In their counter-suggestions plaintiffs say the complaint also seeks relief against the enforcement of the State Sunday law, Ill. Rev. Stats., 1941, Chap. 38, § 282, par. 500, p. 1179. It is sufficient to say that on the authorities already cited the validity of that statute cannot be determined by complaint in equity. The order will be affirmed.

AFFIRMED.

McGurney, P. J., and O'Connor, J., concur.

41959

ANNA S. HOPSTEIN, )  
Appellee, ) APPEAL FROM  
v. ) SUPERIOR COURT,  
JOSEPH HENTSCHEL, )  
Appellant. ) COOK COUNTY.

314 I.A. 387<sup>1</sup>

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a decree setting aside the release of a trust deed and granting foreclosure of it; also from an order affirming the master's report of sale and distribution and entering a judgment for deficiency against defendant in the sum of \$1,864.78, and appointing a receiver for the premises. The decree was entered March 3, 1941. The order approving the sale was made June 2, 1941. The premises are known as 2430 Eastwood Avenue in Chicago and are improved by a two-flat brick apartment building.

Defendant Hentschel took title to the premises June 2, 1925. He made a down-payment of \$5,000 on the purchase price of \$15,000. In her original complaint Mrs. Hopstein claimed the purchase was made by Hentschel as a joint adventure with her, and that she contributed \$1,000 toward meeting the purchase price. This defendant denies. The decree finds for the defendant on this issue on the theory that the Statute of Limitations has run against the claim, and plaintiff does not appeal from that part of the decree or argue cross-error.

The sole question between these parties concerns the note and trust deed executed by defendant June 9, 1928. The principal note was for \$5,000, made by defendant to his own order and by him endorsed. Attached were ten interest coupons for the sum of \$150 each, likewise executed and endorsed, representing interest to become due and payable on the principal promissory note until the maturity of it. The trust deed conveyed to Frank J. Lapin, Trustee.

ANNA S. HOPSTEIN,  
Appellee,  
v.  
JOSEPH HENTSCHEL,  
Appellant.

MR. JUSTICE MATHESON DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a decree setting aside the release of a trust deed and granting foreclosure of it; also from an order affirming the master's report of sale and distribution and entering a judgment for deficiency against defendant in the sum of \$1,804.78, and appointing a receiver for the premises. The decree was entered March 8, 1931. The order approving the sale was made June 8, 1931. The premises are known as 2430 East Wood Avenue in Chicago and are improved by a two-flat brick apartment building.

Defendant Hentschel took title to the premises June 8, 1925. He made a down-payment of \$5,000 on the purchase price of \$15,000. In her original complaint Mrs. Hopstein claimed the purchase was made by Hentschel as a joint adventure with her, and that she contributed \$1,000 toward meeting the purchase price. This defendant denies. The decree finds for the defendant on this issue on the theory that the Statute of Limitations has run against the claim, and plaintiff does not appeal from that part of the decree or argue cross-error.

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Plaintiff testified that she went to the bank at the time of the execution of the note, got \$5,000 in cash and turned it over to defendant, and that defendant then gave her the trust deed and notes, told her he had made a will leaving all his property to her; that she gave the securities back to him on his promise he would place them in his safety deposit box to keep for her. Defendant does not deny he received \$5,000 from plaintiff at that time but says it was not her money but his own money which plaintiff had received before from him on her promise to take care of it for him. He says plaintiff kept this money in a "Mason jar" and a "blue pot", the first in the basement of the premises, the second in her room. The money, he says, was the proceeds of savings from his earnings from 1915 to 1937.

Special interrogatories were submitted to a jury of men and women. Their answers indicated they did not accept the "Mason jar" and "blue pot" theories as to the source of this money. Their replies indicated their opinion was plaintiff gave defendant \$1,000 when he purchased the premises, and that plaintiff did not return defendant's own money to him but on the contrary made him a loan of \$5,000 on June 9, 1928, from her own funds.

The relations of the parties become important. Defendant was born in Germany, came to the United States via Canada in 1913, when about twenty years of age. In New York he met plaintiff's husband, William Hopstein, and came with him to Chicago. Defendant was then and has remained a bachelor. He is now about forty-seven years of age. He boarded at the Hopstein home. He seems to have regarded it as his own. Several times the Hopsteins moved; he moved with them. Notwithstanding differences in age, defendant and plaintiff were attracted to each other. In her amended and supplemental complaint plaintiff describes their relations as "intimate" and of such a nature as to create

Plaintiff testified that she went to the bank at the time of the execution of the note, for \$5,000 in cash and turned it over to defendant, and that defendant then gave her the deed and notes, told her he had made a will leaving all his property to her; that she gave the executed note back to him on his promise he would place same in his safety deposit box to keep for her. Defendant does not deny he received \$5,000 from plaintiff at that time but says it was not her money but his own money which plaintiff had received before from him on her promise to take care of it for him. He says plaintiff kept the money in a "kewpie" and a "wine pot", the first in the basement of the premises, the second in her room. The money, he says, was the proceeds of savings from his earnings from 1915 to 1935. Special interrogatories were submitted to a jury of men and women. Their answers indicated they did not accept the "kewpie" and "wine pot" theories as to the source of this money. Their replies indicated their opinion was plaintiff gave defendant \$1,000 when he purchased the premises, and that plaintiff did not return defendant's own money to him but on the contrary made him a loan of \$5,000 on June 2, 1935, from her own funds. The relations of the parties became important. Plaintiff was born in Germany, came to the United States via Canada in 1913, when about twenty years of age. In New York she met plaintiff's husband, William Hopstein, and came with him to Chicago. Defendant was then and has remained a bachelor. He is now about forty-seven years of age. He boarded at the Hopstein home. He seems to have regarded it as his own. Several times the Hopsteins moved; he moved with them. Notwithstanding differences in age, defendant and plaintiff were attracted to each other. In her amended and supplemental complaint plaintiff describes their relations as "intimate" and of such a nature as to create

a fiduciary obligation on the part of defendant. February 13, 1939, plaintiff made her Last Will and Testament. In it she gives all her household furniture to her husband. She recites that for fifteen years they have lived in a house belonging to defendant without rent paid or demanded. She says she feels there is an indebtedness to defendant of not less than \$40 per month for that period, and gives all the balance of her estate to him and appoints him executor, waiving bond. Plaintiff testified defendant promised he would make a like will in her favor. He denies this. She says defendant told her she should state in the will that she owed him some money, and that if she did not her relatives would be able to set the will aside. He denies this.

Defendant's testimony is that shortly after he went to live with the Hopsteins he began to drink heavily; that plaintiff urged him to stop drinking and save his money; that about 1915 he began turning over to her \$5.00 a week; that about 1918 he raised this to \$10.00 per week, and that he continued to turn over to plaintiff that amount each week up to 1937. He was an employee of Edwards & Deutsch, lithographers. Defendant testifies he did not wish the Hopsteins in his flat; that Mrs. Hopstein quarreled with his tenants and because of this he quarreled with her. They agree the first serious quarrel between them was in 1937, when Mrs. Emma Faith Multhaup (who came from California in part to testify in this case, and who from childhood was a friend of Mrs. Hopstein) having obtained a divorce from her husband with assistance from defendant, came to their home. Mrs. Hopstein learned that Joseph Hentschel was taking Mrs. Faith out and showing her other attentions. Mrs. Hopstein says she saw Emma Faith in the flat sitting on defendant's lap kissing him. She says, "I stopped them. I says, listen, if you want to do

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that, go with her in a hotel, don't do it in front of my eyes." Mrs. Faith denies this. She says on oath that no man was ever given such privileges with her except her divorced husband. Defendant says Mrs. Hopstein threatened to shoot him, and that he called the police. He left the flat in which he had lived since he purchased it, and the home in which he dwelt from the time he came to America.

Plaintiff and defendant had been good friends up to this time. She had trouble with her eyes and consulted an eye specialist in Milwaukee. He went with her on trips to see the doctor. In 1930 they went to Germany on the same boat.

On October 3, 1939, defendant made a warranty deed conveying the premises to a Mr. and Mrs. Culberson. He then drove to California, where he met Mrs. Emma Faith Multhaup several times. By his direction the Culbersons made a demand on the Hopsteins to deliver possession of the second apartment at 2430 Eastwood Avenue by April 30, 1940, and shortly began a suit in forcible detainer in the Municipal Court to obtain possession. Defendant admits the forcible entry and detainer suit was by his direction. Plaintiff filed her complaint April 13, 1940, and on July 11, 1940, the Culbersons quitclaimed the premises back to defendant.

Defendant and Mrs. Faith gave testimony in support of the theory of the "Mason jar" and the "blue pot". The story had an element of romance. A young lady friend defendant knew in Germany failed to reply to his letters. He took to drink. Mrs. Hopstein sympathized with and rescued him. The uncontradicted written evidence in the case brands the "Mason jar" and "blue pot" story most improbable. Defendant admits that he had four bank accounts. Why should he choose to have his money left in a "blue pot" or a "Mason jar" under such circumstances? The pur-

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Plaintiff and defendant had been good friends up to this time. She had trouble with her eyes and consulted an eye specialist in Milwaukee. He went with her on trips to see the doctor. In 1930 they went to Germany on the same boat.

On October 3, 1933, defendant made a warranty deed conveying the premises to a Mr. and Mrs. Culbertson. He then drove to California, where he met Mrs. Emma Faith Mulvihill several times. By his direction the Culbertsons made a demand on the Hopsteins to deliver possession of the second apartment at 2430 Eastwood Avenue by April 30, 1940, and shortly began a suit in forcible detainer in the Municipal Court to obtain possession. Defendant admits the forcible entry and detainer suit was by his direction. Plaintiff filed her complaint April 13, 1940, and on July 11, 1940, the Culbertsons disclaimed the premises back to defendant.

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chase price of the premises was \$15,000. He drew money from his bank account to make the first "down payment". Why go to the bank if the money was in the jar and the pot? Why continue to pay interest on encumbrances (as the evidence shows he did) when he had the money in the jar and in the pot, which was not drawing any interest? Why execute the notes and trust deed? The testimony of Mrs. Faith and defendant agree well in every detail but are improbable, considered in the light of all the evidence. The jury were not convinced; the chancellor was not; we are not.

The simple facts appear to be defendant, a youth, became infatuated with Mrs. Hopstein, who was twenty years his senior. She is now seventy years of age. With the coming into their home of the younger woman his affections were transferred. No flat was then big enough for these two. Defendant does not deny he received \$5,000 from Mrs. Hopstein at the time the note and trust deed were executed. When differences arose, having possession of the notes and trust deed, he had the notes marked paid and secured a release from the trustee, which he put of record. There is no controversy as to the amount due. The defendant argues the trustee was a necessary party, but this was not the case since the trustee conveyed back to him.

Twelve points are made in the brief with numerous citations of authorities. The law governing is well stated in Riehl v. Riehl, 247 Ill. 475, 477, 478. It would serve no useful purpose to analyze cases cited. The decree will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

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Twelve points are made in the brief with numerous citations of authorities. The law governing is well stated in Rieth v. Rieth, 247 Ill. 475, 477, 478. It would serve no useful purpose to analyze cases cited. The decree will be affirmed.

ATTEST.

Mosherly, P. J., and O'Connor, J., concur.



41925

JOSEPH WAGNER, doing business as )  
WAGNER DAIRY PRODUCTS, )  
Appellant, )

APPEAL FROM

v. )

SUPERIOR COURT,

M. OKNER, )

COOK COUNTY.

Appellee. )

314 I.A. 387<sup>2</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT,

Plaintiff filed a suit against defendant and obtained a preliminary injunction which, on appeal, was dissolved by this court, Wagner v. Okner, 306 Ill. App. 601. Afterward defendant filed suggestions for damages for the wrongful issuance of the injunction. The matter was referred to a master in chancery who took the evidence, made up his report and found that defendant was entitled to \$400 attorney's fees for his services in securing the dissolution of the injunction. The master's fees, and defendant's damages of \$1 were also included, making a total of \$543.30. It is to reverse this order or decree that plaintiff appeals.

The first pages of plaintiff's brief are taken up with the motion to strike from the transcript of the record what counsel designates as "the purported report of trial proceedings" had before the chancellor.

Rule 5 of this court provides that "All motions shall be in writing, supported by affidavit. They shall be filed with the clerk, together with three copies of the reasons and affidavits in support thereof, at least one day before they shall be called by the court. A copy of the motion, with reasons and affidavits, shall be served on counsel of the opposite party at least one day before they shall be filed with the clerk. All motions shall be entered by the clerk in a motion book, and on the day heretofore appointed by Rule 2 such motions will be called at the opening of court and determined or taken under advisement; notice of intention to file objections may be given to the court orally

JOSEPH WAGNER, doing business as  
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Appellant,

v.

M. OKNER,  
Appellee.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a suit against defendant and obtained a preliminary injunction which, on appeal, was dissolved by this court, Warner v. Okner, 308 Ill. App. 801. Afterward defendant filed suggestions for damages for the wrongful issuance of the injunction. The matter was referred to a master in chancery who took the evidence, made up his report and found that defendant was entitled to \$400 attorney's fees for his services in securing the dissolution of the injunction. The master's fees, and defendant's damages of \$1 were also included, making a total of \$403.30. It is to reverse this order or decree that plaintiff appeals.

The first pages of plaintiff's brief are taken up with the motion to strike from the transcript of the record what counsel designated as "the purported report of trial proceedings" had before the chancellor.

Rule 3 of this court provides that "All motions shall be in writing, supported by affidavit. They shall be filed with the clerk, together with three copies of the reasons and affidavits in support thereof, at least one day before they shall be called by the court. A copy of the motion, with reasons and affidavits, shall be served on counsel of the opposite party at least one day before they shall be filed with the clerk. All motions shall be entered by the clerk in a motion book, and on the day before appointed by Rule 3 such motions will be called at the opening of court and determined or taken under advisement; notice of intention to file objections may be given to the court orally

when the motion is called. Objections thereto must also be in writing and three copies filed not later than the next day after the motion is called, and replies to objections will not be allowed and oral arguments on motions will not be heard. Motions shall not be presented in any other way or at any other time except in case of necessity." The provisions of the rule were not followed and the motion is not properly made for the first time in the brief filed by plaintiff. But in any event, there is no merit in the motion. We think the court followed the proper procedure in showing, by the record, what had taken place. The purpose of an appeal is to have any errors corrected that may have been committed by the trial court and obviously this cannot be done unless all that takes place is shown. Rule 1 of this court and Rule 36 of the Supreme court provide that "A brief statement by the trial judge of the reasons for his decision may be included in the report of the proceedings at the trial." This, in substance, is what appears from that part of the record complained of.

The record discloses that December 4, 1940, which was about two months after this court rendered its opinion reversing the injunctional order, defendant filed suggestions for damages, his counsel setting up in detail the services he rendered beginning June 6 and ending November 29, aggregating a total of 50 1/2 hours. December 14, defendant <sup>plaintiff</sup> filed his answer to the suggestions and on the same day <sup>defendant</sup> filed his answer to plaintiff's complaint. January 30, 1941, the matter on the suggestion of damages, was referred to a master to take the evidence and make up his report, together with his conclusions. The master made up his report, and supplemental report, to which plaintiff filed objections, they were overruled, and the report was filed in court April 24, 1941. The master recommended the allowance of \$400 solicitor's

when the motion is called. Objections thereto must also be in writing and three copies filed not later than the next day after the motion is called, and replies to objections will not be allowed and oral arguments on motions will not be heard. Motions

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fees and on the same date, April 24, 1941, an order was entered that all objections stand as exceptions and that further exceptions might be filed within 10 days by either party, and the matter was set for hearing May 19, 1941 on the contested motion calendar. April 30, plaintiff filed additional exceptions to the master's report and supplemental report. May 23, 1941, an order was entered which recites that the matter came on before the court on plaintiff's motion on his petition for a change of venue. He was given leave to file the petition instanter and the change of venue was denied.

The petition is in the conventional form and is sworn to by plaintiff May 22, 1941, and states the judge was prejudiced against him and such fact came to his knowledge May 20, 1941. June 6, 1941, the court entered an order allowing the damages as recommended by the master. June 25, plaintiff filed a notice of appeal and on the same day, an order was entered fixing the appeal bond at \$1,000. At the same time plaintiff filed his praecipe for record. June 27 a stipulation was entered into between the parties that the original master's report be incorporated in the transcript in lieu of a copy. On the same day an order was entered, upon motion of defendant, that the report of the proceedings on the hearing before the chancellor on plaintiff's petition for a change of venue, which was on that date filed, should be included in the record on appeal. Plaintiff objected to this order. On the same day the report of the proceedings was filed. It is certified by the trial judge and shows the proceedings beginning December 4, 1940, and the several days on which the matter was before the court thereafter. That on May 19, 1941, the matter was called, the court was advised that counsel for plaintiff was engaged and plaintiff requested a continuance. Thereupon counsel for defendant objected and requested

Thereon counsel for defendant objected and requested counsel for plaintiff was engaged and plaintiff requested a continuance. Thereupon counsel for defendant objected and requested that the matter be called, the court was advised that on May 19, 1941, the matter was called, the court was advised that on which the matter was before the court thereafter. That on the proceedings beginning December 4, 1940, and the several days proceedings was filed. It is certified by the trial judge and shows objected to this order. On the same day the report of the plaintiff should be included in the record on appeal. Plaintiff's petition for a change of venue, which was on that date of the proceedings on the hearing before the chancellor on plaintiff's motion of defendant, that the report be incorporated in the transcript in lieu of a copy. On the same day between the parties that the original master's report be incorporated for record. June 27 a stipulation was entered into appeal bond at \$1,000. At the same time plaintiff filed his of appeal and on the same day, an order was entered fixing the as recommended by the master. June 28, plaintiff filed a notice against him and such fact came to his knowledge May 30, 1941, to by plaintiff May 28, 1941, and states the judge was prejudiced the petition is in the conventional form and is sworn the change of venue was denied.

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the court to approve the master's report, and handed an order to the court to that effect. Thereupon the court told counsel representing plaintiff's counsel that he had considered the matter and found no basis for the exceptions to the master's report, but the representative requested a continuance until the next day, which was granted, and on the next day, May 20, the matter was again brought before the court when counsel for plaintiff was advised by the court what had taken place the previous day. Thereupon counsel requested another continuance so he could look up some cases.

At that time the record discloses that it was brought to the attention of all parties that the reference had been made January 30, 1941, and the master's report had been on file since April 24, 1941, and that the court had theretofore announced his decision and had granted a continuance until May 27, to afford an opportunity for counsel to look up some law. The next that appears is 3 days later, May 23, when the petition for change of venue was presented. We think the petition was presented too late. Eick v. Eick, 277 Ill. App. 329; In Re Wheeling Drainage District No. 1, 282 Ill. App. 565.

In the Eick case, in discussing the propriety of an order denying a petition for a change of venue we said: "The record discloses that the petition was presented after the close of all the evidence and after the chancellor had made his finding. It is obvious that the petition came too late. If it were permissible to file a petition for a change of venue after the evidence is all heard and the court has announced his decision, then there might never be a decision in any case because the party who was defeated could then present his petition for a change of venue. Obviously, this is not the law. The petition, not being presented in time, was properly denied."

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In the Wheeling case we said: "It has been repeatedly held that where a court has already commenced a hearing and has by his rulings indicated his views, it is too late for the party against whom such rulings have been made to move for a change of venue. \*\*\* It is the established rule that after a trial of a cause has commenced or is about to be commenced, it is too late to grant a petition for a change of venue. Hudson v. Hanson, 75 Ill. 198. In Richards v. Greene, 78 Ill. 525, it was said that to allow a change of venue after a trial has commenced or is about to be commenced would lead to endless delay, is not authorized by the statute and cannot be encouraged." The petition for a change of venue was properly denied. It was presented only for delay.

Plaintiff further contends that the \$400 allowed for solicitor's fees is excessive, and in support of this it is said that it appears from the record that defendant was his own attorney until after the case was reversed by this court. We think there is no merit in this contention. Defendant filed a special appearance in his own behalf but the evidence shows all the services were rendered by his counsel and the appearance was purported to have been prepared by the client for the sole purpose of saving a point which he thought might otherwise be waived.

Counsel for defendant, as a part of his suggestions for damages, attached an itemized statement as to the services rendered by him. The dates are set forth, the nature of the work done on each of the days, etc., and the number of hours necessarily employed was 50 1/2. On the hearing before the master defendant's counsel testified as to the services rendered by him and that the reasonable charge would be \$750. Other attorneys called by defendant testified, one that the services rendered were reasonably worth \$600, another \$750, another \$15 an hour or \$750. On the other side, counsel for plaintiff testified as

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to the time in court on the several occasions. Three other attorneys were called, one testified the services were reasonably worth \$75 on the basis that there was but \$100 involved in the case. We think this is a misconception of the amount involved. The other two testified, one that the services were reasonably worth from \$100 to \$125 and the other from \$90 to \$110.

We have considered the evidence on this phase of the case and are of opinion we would not be warranted in holding the amount allowed by the master, approved as it was by the chancellor, was so excessive as to require interference on our part.

The order and judgment of the Superior court of Cook county appealed from is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

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The order and judgment of the Superior Court of Cook

County appealed from is affirmed.

AFFIRMED.

McGuire, P. J., and Macchett, J., concur.

41936

VIRGINIA MARTIN, a minor by  
HENRY MARTIN, her father and  
next friend,

Appellee,

v.

CITY OF CHICAGO, a Municipal  
Corporation, and PUBLIX FUR-  
NITURE COMPANY, a Corporation,

CITY OF CHICAGO, a Municipal  
Corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

388

314 I.A. ~~41936~~

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, a minor, by her father and next friend, brought an action against the City of Chicago and the Publix Furniture Company to recover damages for personal injuries claimed to have been sustained by her through the negligence of the City in failing to keep and maintain the sidewalk in front of the premises known as 306 East 31st street in a proper state of repair and defendant, in negligently allowing furniture, rugs and carpet to be upon the sidewalk in front of the premises. The case was called for trial February 25, 1941, and the report of the proceedings disclosed the counsel appearing for plaintiff and for the City, that no one represented defendant, Publix Furniture Company and what disposition, if any, was made in the case as to that defendant, so far as the record discloses is a mystery. During the trial, on motion of counsel for plaintiff, leave was given to amend by striking out the words, that Virginia Martin appeared by her next friend and that she should appear as plaintiff in the case. There was a verdict and judgment in plaintiff's favor for \$1,800 and the City appeals.

The record discloses that about 3 o'clock on Saturday afternoon, March 28, 1936, plaintiff, then about 14 years old, was roller skating with a girl friend on 31st street. The premises

VICTORIA, B.C., CANADA  
JANUARY 11, 1933  
Next Friday

Y.

CITY OF VICTORIA, a corporation,  
and the  
LITIGANT, a corporation.

CITY OF VICTORIA, a corporation,  
Appellant.

THE JUSTICE OF THE PEACE, VICTORIA, B.C.

Sheweth, that the said City of Victoria, a corporation,

brought an action against the said Litigant, a corporation,

for damages to recover for loss of business and

to have been sustained by her through the negligence of the

defendant, in negligently allowing the said Litigant, a corporation,

to keep on the said premises a large number of cars and

to allow the same to be used for the purpose of the said

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City appeals.

The record discloses that about 5 o'clock on Thursday

afternoon, March 22, 1933, plaintiff, then about 14 years old,

was roller skating with a girl friend on 21st street. The witness

at 306 East 31st street was occupied by a furniture store, and the sidewalk was covered with a rug about 2 inches thick. There was furniture on the sidewalk near the curb and against the building on both sides of the rug. Plaintiff was skating east on the sidewalk and when she came to the rug she walked on it with her skates, stumbled and fell backward and was severely injured. She had passed the premises in question once or twice a week for about 2 years prior to the accident and had gone to a nearby store on her roller skates but did not notice any hole in the sidewalk. Her companion, who was ahead of her, crossed over the rug in safety.

Plaintiff called witnesses who testified there was a hole in the sidewalk in front of 306 East 31st street about 1 foot square and an inch and a half deep. Gwendolin Andrew, a young girl about 13 years of age at the time of the accident, was with plaintiff and testified they were on roller skates going to an A. & F. store nearby; that a rug was covering the sidewalk in front of 306 East 31st "and furniture and different things on both sides of the sidewalk." When they reached the rug they looked to see if they could cross it without falling; that plaintiff looked on both sides and tried to figure how she could go across; that she was about the middle of the rug when she fell.

On cross-examination counsel for defendant, after interrogating her as to some of the facts, submitted a photograph purporting to show the condition of the sidewalk in front of the building, for the purpose of identification, and exhibited the picture to counsel for plaintiff. After the witness had examined the photograph counsel for the City said: "would you say that picture portrays the condition of the sidewalk as it was on March 28, 1936?" This was objected to, the objection overruled and the witness answered in the affirmative - that the sidewalk was in the same condition on the day of the accident as shown by the photograph.

at 308 West 31st Street was occupied by a building, and the sidewalk was covered with a rug about 2 inches thick. There was furniture on the sidewalk near the curb and against the building on both sides of the rug. Plaintiff was skating east of the sidewalk and when she came to the rug she walked on it for a few feet, stumbled and fell backward and was seriously injured. She passed the premises in question once or twice a week for about 2 years prior to the accident and had gone to a nearby store on her roller skates but did not notice any hole in the sidewalk. Her companion, who was ahead of her, crossed over the rug in safety. Plaintiff called witnesses and testified that there was a hole in the sidewalk in front of 308 West 31st Street about 1 foot square and an inch and a half deep. She testified that with Plaintiff and 13 years of age at the time of the accident, they were on roller skates going to an N. Y. store nearby; that a rug was covering the sidewalk in front of 308 West 31st Street and different things on both sides of the sidewalk. When they reached the rug they looked to see if they could cross it without falling; that Plaintiff looked on both sides and tried to figure how she could go across; that she was about the middle of the rug when she fell.

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Other witnesses, some of whom had seen the accident, were called on behalf of plaintiff and gave testimony, to the effect that there was a hole in the sidewalk. Irma Campbell testified she had seen the accident and had "noticed a defective condition in the sidewalk approximately six months before March 28, 1936. There were several cracked places in the sidewalk and at this particular point the sidewalk had caved in. It was approximately two feet long and about a foot and a quarter wide and sunk in about three inches." That when she observed this condition before the accident there was no rug on the sidewalk. Julia Andrew testified that she saw a hole in the sidewalk in 1936. "It was about a foot both ways. I just stumped my foot, it didn't seem to go down." It was about an inch or an inch and a half deep. Other witnesses gave substantially the same testimony.

At the close of plaintiff's case the City moved for a directed verdict which the court said he would "reserve." Thereupon counsel for the City offered the photograph of the sidewalk hereinbefore referred to, and over objection it was admitted. Defendant offered no further evidence and the case went to the jury with the result as above stated.

Plaintiff's theory of the case is that there was a hole in the sidewalk for a considerable period of time prior to the accident and that this condition was the result of the City's negligence. On the other side, defendant's theory of the case is that there was no hole in the sidewalk, that plaintiff was guilty of contributory negligence and that a rug was placed on the sidewalk by a third person, which constituted an intervening cause, which was the proximate cause of the accident, and that the verdict and judgment is against the manifest weight of the evidence. We are not interested as to whether there was an intervening cause. The only question of importance in the case is whether there was a hole in the sidewalk or

Other witnesses, some of whom had seen the accident, were called on behalf of plaintiff and gave testimony, to the effect that there was a hole in the sidewalk. Irma Campbell testified she had seen the accident and had "noticed a defective condition in the sidewalk approximately six months before March 28, 1935. There were several cracked places in the sidewalk and at this particular point the sidewalk had caved in. It was approximately two feet long and about a foot and a quarter wide and sunk in about three inches." That when she observed this condition before the accident there was no rug on the sidewalk. Julia Andrew testified that she saw a hole in the sidewalk in 1935. "It was about a foot both ways. I just stumbled my foot, it didn't seem to go down." It was about an inch or an inch and a half deep. Other witnesses gave substantially the same testimony.

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whether it was in a bad state of repair. As stated, a number of witnesses testified there was a hole in the sidewalk. But from the photograph in evidence which the witness, Gwendolin Andrew, who was with plaintiff at the time testified portrayed a true condition of the sidewalk as it was March 28, 1936, it is clear there was no hole in the sidewalk and the finding of the jury in plaintiff's favor is against the manifest weight of the evidence.

The judgment of the Circuit court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.



STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

October Term, A. D. 1941

Agenda 22

Term No. <sup>41022</sup> ~~22~~

NAKO RISTO,

Plaintiff-Appellant,

vs.

FIRST NATIONAL BANK OF  
MADISON,

Defendant-Appellee.

Appeal from the

Circuit Court of  
Madison County.

314 I.A. 403

STONE, P. J.

This appeal is from a judgment of the Circuit Court of Madison County against plaintiff for costs and in favor of defendant. Said suit was brought by plaintiff on a time certificate of deposit issued by defendant to plaintiff on July 13, 1924. The amount of this certificate of deposit afterwards took the form of a draft on the Chemical National Bank of New York, payable to plaintiff. The draft was delivered by defendant to plaintiff's agent who took it to New York, forged the name of plaintiff thereon and obtained the amount of the funds. Plaintiff was a Greek who had lived in this country about fifteen years, residing near Madison, Illinois. While there he acquired some money and had about three thousand dollars on deposit in defendant, which was evidenced by a time certificate payable 12 months after date with four percent. interest. Plaintiff had done his banking business with defendant for some years. In 1920 he had some twenty-six hundred dollars on deposit with defendant under a time certificate payable 12 months after date with interest at four percent. On July 13, 1931, plaintiff endorsed this certificate to defendant, and in exchange therefor, together with \$295.97 in cash, received another time certificate for the sum of \$3,000. This certificate was identical with the one issued the previous year and was issued under the same conditions and at the same rate of interest.



In September, 1921, plaintiff informed defendant that he was leaving for Greece and that he was leaving his certificate, the one just described, with C. P. Veschuroff, a merchant at Madison who was known to defendant, for the purpose of surrendering it when due in exchange for a new certificate of like tenor and effect, and that this process would be repeated from year to year. It was so repeated. From year to year Veschuroff turned in the certificate which was mature, added the interest thereon, and received a new certificate of the same tenor for the new amount. When the last certificate, No. 7896, came due in July Veschuroff instead of surrendering it to the bank in exchange for a new certificate of like tenor, without the knowledge or consent of the plaintiff as far as this record shows, requested the defendant to issue a New York draft for the entire amount of the deposit and accrued interest. This the bank did, drawing said draft on the Chemical National Bank of New York, City. The exact amount of the draft was \$3,509.57. This draft was made payable to plaintiff. The bank thereupon took the matured certificate of deposit, No. 7896, stamped it paid, and filed it among its cancelled certificates. It then charged the amount of the draft against plaintiff's deposit and accrued interest on its books.

In June, 1925, plaintiff wrote to Veschuroff to send him \$50.00 of the interest which would accrue on the certificate when it matured on July 13. Veschuroff sent plaintiff the \$50.00, but he did not tell him that he had surrendered the certificate for a draft, had forged plaintiff's name on the back of the draft, deposited the sum to his own credit in his own bank, and appropriated the proceeds thereof to his own use. This character of conduct was continued from time to time for a period of some five years, which appears from the record to be a complete deception of plaintiff by Veschuroff. In 1930, plaintiff requested Veschuroff to send him the certificate, and Veschuroff for the first time informed plaintiff of what he had done. He did not, however, tell him how and when it had been done, and plaintiff was not fully advised about the facts





until the year 1932. Much time was put in by plaintiff in trying to discover the exact condition of his account with defendant. The correspondence proved unsatisfactory. Counsel was afterwards retained, and after making demand upon defendant for the amount in question, and that being unavailing, plaintiff's counsel brought suit in his name for the amount.

When Veschuroff received from the defendant bank, on July 23, 1925, the draft for \$3,509.57 on the Chemical National Bank of New York, he forged plaintiff's name on the back of it, spelling his first name "Naco" instead of "Nako", as plaintiff spells it. He then stamped upon it an endorsement "Pay to Irving Bank - Columbia Trust Co., New York, or order, all prior endorsements guaranteed, C. P. Veschuroff & Son," and deposited it to the credit of his checking account in Irving Bank - Columbia Trust Co., New York, which collected it from the drawee bank through the New York Clearing House on July 27, 1925. The cancelled draft was then returned to the defendant bank, and by it filed away among its records.

At the time of rendering judgment the trial court expressly found that the endorsement of plaintiff's name on the back of the draft was a forgery. Defendant introduced evidence that it had searched for and could not find the signature card of plaintiff, and that it had searched for and could not find written authority from the plaintiff to issue a draft for the amount of the certificate of deposit. Veschuroff testified, or attempted to testify, that he had received a letter from plaintiff authorizing him to cash the certificate. This evidence was properly excluded by the Court.

The assignments of error are that the Court erred in finding the issues for the defendant and in not entering judgment for the plaintiff, and so forth.

Two questions are presented by this record: first, was the defendant legally justified in issuing the draft for the certificate of deposit and delivering same to Veschuroff? Appellee contends that it was, by reason of the apparent agency of Veschuroff of plaintiff. There is no proof of actual agency to do this particular act, but there is proof of the agency of Veschuroff to exchange the deposit



certificates as he had done.

The second question is: This draft having been paid on a forged endorsement of plaintiff's name, did such act establish liability against defendant?

Appellee seriously contends that the circumstances of the dealings between it and Veschuroff together with his standing in the community, fully warranted defendant in delivering the draft to Veschuroff as it did; that is that Veschuroff had apparent authority to do what he did, that his agency in this respect was an apparent agency, in addition to such express agency as they had acted on in the former transactions. Appellant with equal vehemence denies that justification.

There are cases in Illinois which approve of the theory of lawfully acting on apparent agency; but not one of these cases is precise authority for this case or any other case of a similar character. In each instance, the right to act upon apparent agency must be governed by the facts and circumstances of that particular case. Under the evidence in this case we cannot agree that Veschuroff had such apparent authority as to justify defendant's action. But we do not regard that question as the controlling question in this case. If we assume, for the sake of argument, that defendant was warranted in delivering the draft in question to Veschuroff under the circumstances of such delivery, we still are constrained to hold both under law and under logic, as we view it, that the delivery of this draft without the knowledge or consent of plaintiff did not pay the debt which defendant owed to plaintiff by reason of plaintiff's deposit in defendant.

Cases are numerous in Illinois which hold that the mere deposit of a check in the usual course of business is for collection only and not as money; and where a creditor endorses and deposits a check tendered by a debtor in satisfaction of a claim, the acceptance is on condition that the check will be paid in due course. Smith, Admr. vs. Bond, 311 Ill. 311. To the same effect is First National Bank of Chicago vs. Pease, 68 Ill. 40. It must necessarily



be so, else the issuing of checks and drafts in payment of debts would open the gateway to the grossest fraud to an incalculable extent. It is almost universally held that the payment of a check on a forged endorsement makes the bank which pays said check liable to the proper payee. In the case of a draft it is not payment of a debt until it is accepted by the drawee. In State Bank of Chicago, vs. Mid-City Trust & Savings Bank, 295 Ill. 21, it is held "If the drawee bank has accepted a check at the request of payee it is liable to payee, but if the acceptance is not at the request of payee, it is of no effect as to him, and the liability of the bank to the drawer is not affected by it." In Vanetta vs. Lindley, 198 Ill. 40, it is held that a "forged endorsement is void, even in the hands of an innocent purchaser for value without notice."

It seems perfectly logical to us, even in the absence of authority that a bank cannot extinguish its depositor's account by issuing its draft and passing it on to a stranger. Many things might happen which would unquestionably render the account of payee just as it was before the draft was drawn. Suppose the payee should lose the draft and make proper proof of that, could it be said that the act of writing the draft closed the account and paid the depositor in full, the bank having been out no money? Suppose a fire should extinguish the draft in the hands of the payee, along with his other chattels, would the bank which issued that draft not still be indebted to the payee? Suppose the draft were stolen from the payee and proof of that fact was made, would it not be the duty of the drawer to make proper notice and upon that being established, wouldn't the account of the payee in the draft be the same with the drawer as it had always been? In this case the draft was worse than stolen, and there is the additional circumstance that it never came into the hands of the payee and never came to his knowledge until years after, that the draft had been issued in his name, or in fact had been issued at all. So it must follow that there is some point which marks distinctly the point at which the

1. The first part of the book is devoted to a general introduction to the subject of the history of the English language. It discusses the various factors which have influenced the development of the language, such as contact with other languages, internal changes, and the influence of social and cultural factors.

2. The second part of the book is devoted to a detailed study of the history of the English language from its earliest beginnings to the present day. It traces the development of the language from its roots in Old English to the modern English of today.

3. The third part of the book is devoted to a study of the various dialects of the English language. It discusses the differences between the various dialects and the factors which have influenced their development.

4. The fourth part of the book is devoted to a study of the various stages of the English language. It discusses the changes which have taken place in the language from one stage to the next, and the factors which have influenced these changes.

5. The fifth part of the book is devoted to a study of the various influences on the English language. It discusses the influence of other languages, such as Latin and French, and the influence of social and cultural factors.

6. The sixth part of the book is devoted to a study of the various uses of the English language. It discusses the differences between the various uses of the language, such as literary, scientific, and colloquial.

7. The seventh part of the book is devoted to a study of the various problems of the English language. It discusses the various problems which have arisen in the history of the language, and the factors which have influenced these problems.

8. The eighth part of the book is devoted to a study of the various theories of the English language. It discusses the various theories which have been advanced to explain the development of the language, and the factors which have influenced these theories.

9. The ninth part of the book is devoted to a study of the various methods of the English language. It discusses the various methods which have been used to study the language, and the factors which have influenced these methods.

10. The tenth part of the book is devoted to a study of the various results of the English language. It discusses the various results which have been achieved in the study of the language, and the factors which have influenced these results.

11. The eleventh part of the book is devoted to a study of the various conclusions of the English language. It discusses the various conclusions which have been reached in the study of the language, and the factors which have influenced these conclusions.

12. The twelfth part of the book is devoted to a study of the various suggestions of the English language. It discusses the various suggestions which have been made in the study of the language, and the factors which have influenced these suggestions.

13. The thirteenth part of the book is devoted to a study of the various problems of the English language. It discusses the various problems which have arisen in the history of the language, and the factors which have influenced these problems.

draft is paid and the drawer thereof is relieved of liability. That point under the law is when such draft is accepted and paid by the drawee. But this means a lawful acceptance and a lawful payment, not the acceptance of a void instrument and payment thereon. The drawee cannot give life by a pretended acceptance and payment thereof to an instrument that is utterly void as the draft in this case was when it was presented with the payee's name forged thereon.

In addition to the cases cited, these propositions have been held and elucidated very clearly in some of the other jurisdictions whose Negotiable Instrument Act is identical with our own. Szevento Juozupo vs. Manhattan Savings Institution, 178 Appellate Division, New York, 57; Tappler vs. Boston Penny Savings Bank, 2nd Northeastern, 2nd Ed. 198 (Mass.). These cases collect many citations through different jurisdictions, and in each of them the facts in the case are such as to render the case authority in the case at bar.

In the instant case the drawee bank did an unlawful act; it cannot profit by that. The payee whose name was forged cannot suffer by it; the conditions exist as they existed originally; the drawee bank had no right to charge the amount of the draft against defendant's account with it. Therefore, defendant still had its account intact, and, therefore, still held the money of plaintiff. If these facts are not literally true, the legal machinery is at hand to bring about exactly that situation.

Another fact which would seem to place an additional burden upon defendant in this case is that it must have known that when it even issued the draft, it was doing so under questionable right to say the least, and when the draft came back to it within seven days it knew for two reasons that the name of the payee had been forged thereon. First, because the payee lived in Greece and the draft could not possibly have gotten there and been endorsed by him and returned to New York and back to them within seven days. In those days the commercial plane and the mail plane had not





arrived at their present state of efficiency. Secondly, they were familiar with plaintiff's signature, or in the exercise of reasonable care in that behalf would have been acquainted with it, and they were charged with the duty of seeing whether that draft was endorsed by the proper payee. Had they done this they could have and would, in the course of honest and intelligent banking, immediately have notified the drawee bank of such forgery and held it responsible for its wrongful act, instead of apparently assisting it as it did.

For the above reasons, together with the above authorities, we are of the opinion that at the time of the bringing of this suit, the status of debtor and creditor existed between plaintiff and defendant, and that plaintiff had a right to recover the full amount of his claim.

The case is reversed and remanded to the trial court with instructions to that court to award judgment to plaintiff for the full amount of his claim together with legal interest thereon, to be computed under the direction of said court.

REVERSED AND REMANDED WITH DIRECTIONS.

Abstract

FILED

MAR 31 1911

*David J. Mallett*  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS



41972

3111A. 404

CITY OF CHICAGO,  
Appellee,

v.

LESTER SIMON IMP. MILTON H. CALLNER,  
Appellants,

)  
) APPEAL FROM  
)  
) MUNICIPAL COURT,  
)  
) OF CHICAGO.

38

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a finding of guilty of violating a city ordinance entered February 5, 1941. A fine of \$200 was assessed with judgment therefor and for costs. The judgment order recites: "The Court finds that it has jurisdiction of subject matter and parties hereto, and that 'defendant' has been convicted of violation of ordinance according to law and that 'any person' so convicted may be imprisoned in House of Correction for non-payment of fine".

There was a motion (by whom the record does not state) to vacate the judgment which was continued from time to time and finally denied. June 4, 1941, Milton Callner by leave appeared specially and filed a written motion to vacate the judgment. The same day Lester Simon made a written motion to vacate. July 3, 1941, the trial judge entered an order overruling motion of "defendant" heretofore entered herein to vacate judgment. There was also a motion in arrest of judgment, by whom the record does not state. This was denied July 9, 1941, and the record states a "warrant ordered". The record shows a motion (by whom is not stated) to stay the warrant. On July 15, notice of a joint and several appeal by Lester Simon and Milton H. Callner was filed.

By a special plea Callner raised the question of whether the court had jurisdiction of him. The complaint was filed August 1, 1940. The complaint did not name Callner as defendant. No process issued against or was served on him. On the face of the complaint after the address of Lester Simon appears the words,

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• 2011-12 40

*[Faint, illegible handwritten text]*

for non-payment of fine",  
'any person' so convicted may be imprisoned in House of Correction  
convicted of violation of ordinance according to law and that  
subject matter and parties hereto, and that 'defendant' has been  
order recites: "The Court finds that it is a violation of  
assessed with judgment therefor and for costs. The judgment  
a city ordinance entered February 5, 1941. A fine of \$500 was  
This is an appeal from a finding of guilt of violating

the complaint after the address of Lester Simon appears the words, "On the face of No process issued against or was served on him. On August 1, 1940. The complaint did not name Galtner as defendant. The court had jurisdiction of him. The complaint was filed By a special plea Galtner raised the question of whether several appeal by Lester Simon and Milton H. Galtner was filed, stated) to stay the warrant. On July 15, notice of a joint and a "warrant ordered". The record shows a motion (by whom is not not state. This was denied July 9, 1941, and the record states was also a motion in arrest of judgment, by whom the record does "defendant" heretofore entered herein to vacate judgment. There 3, 1941, the trial judge entered an order overruling motion of The same day Lester Simon made a written motion to vacate. July specially and filed a written motion to vacate the judgment. finally denied. June 4, 1941, Milton Galtner by leave appeared to vacate the judgment which was continued from time to time and There was a motion (by whom the record does not state)

(written by an unknown person with lead pencil) "Imp. Milton Callner". There is no order making Callner a defendant. The complaint says Inspector Murphy was sworn and on information and belief says that Lester Simon on May 16, 1940, violated the ordinance in that he "on said day owned, maintained or controlled premises at 1250-58 S. Halsted St., Chicago, in an unsafe manner by failing to remove awning which obstructs fire escape at 1st floor". The complaint continues: "Also by failing to install an approved system of automatic sprinklers in premises throughout basement".

The complaint recites that it is subscribed and sworn to before the Clerk of the court October 15, 1940, which is about 75 days after it was filed. It is not "subscribed" by "Inspector Murphy" or by anybody else. The record recites that on August 7, 1940, Inspector Murphy presented the complaint under oath and moved for leave to file it; that the judge examined the complaint and examined under oath the person presenting it, and was satisfied there was probable cause, and that leave was given to file it. The record also recites that it was ordered "defendant" be held to bail and be permitted to deposit \$50 cash in lieu of bond. The order also recites that it appearing to the court "that 'defendant' herein was arrested without warrant, capias or other writ and is now here present in open court, court takes jurisdiction of person of said 'defendant' and bailiff is ordered to take body of said 'defendant' into custody."

The next proceeding shown in the record is under date of February 5, 1941, when the record states said "defendant" was advised of his right of trial by jury and elected to waive it; that this cause is by agreement in open court between the parties hereto submitted to the court for trial; that the court heard evidence and argument of counsel and finds "the defendant" guilty, assesses a fine "against said defendant".

(written by an unknown person with lead pencil) "Imo. Wilson  
Gallner". There is no order making Gallner a defendant. The  
complaint says Inspector Murphy was sworn and on information  
and belief says that Lester Wilson on May 15, 1940, violated the  
ordinance in that he "on said day owned, maintained or controlled  
premises at 1280-28 E. Halsted St., Chicago, in an unsafe manner  
by failing to remove sawing which obstructs fire escape at 1st  
floor". The complaint continues: "Also by failing to install  
an approved system of automatic sprinklers in premises through-  
out basement".

The complaint recites that it is subscribed and sworn to  
before the Clerk of the court October 15, 1940, which is about  
75 days after it was filed. It is not "subscribed" by "Inspector  
Murphy" or by anybody else. The record recites that on August 7,  
1940, Inspector Murphy presented the complaint under oath and  
moved for leave to file it; that the judge examined the complaint  
and examined under oath the person presenting it, and was satis-  
fied there was probable cause, and that leave was given to file  
it. The record also recites that it was ordered "defendant" be  
held to bail and be permitted to deposit \$50 each in lieu of  
bond. The order also recites that it appearing to the court  
"that 'defendant' herein was arrested without warrant, capias  
or other writ and is now here present in open court, court takes  
jurisdiction of person of said 'defendant', and bailiff is ordered  
to take body of said 'defendant' into custody."

The next proceeding shown in the record is under date of  
February 5, 1941, when the record states said "defendant" was  
advised of his right of trial by jury and elected to waive it;  
that this case is by agreement in open court between the parties  
hereto submitted to the court for trial; that the court heard  
evidence and argument of counsel and finds "the defendant" guilty.

assesses a fine "against said defendant"

Except in the complaint the record does not once name Lester Simon, and not once does it name Milton Callner except in the complaint as "Imp. Milton Callner". The record is unique and unusual in that neither from the finding, the judgment nor the pleadings is it possible to tell with certainty who the judgment is against or whether it was the intention of the court to find one or both persons named in the complaint guilty of the violation of the ordinance.

In the first place, we think it is clear the court had no jurisdiction over Milton H. Callner. No order was entered making him a party to the proceeding. No complaint was filed which named him as a violator of the ordinance. This was a case of the fifth class in the Municipal Court. (Ill. Rev. Stats., 1941, Chap. 37, §2, p. 1044.) The City says that under Section 49 of the Municipal Court Act, which describes the practice in cases of the fifth class, it was unnecessary to file any statement of claim. Section 19 of the Act in part provides:

"The issues shall be determined without other forms of written pleadings than those hereinafter expressly prescribed or provided for."

The fair construction of this section is that the forms of written pleadings provided in the statute or rules shall be followed. Section 40 of the Municipal Court Act provides that the court may make all rules necessary to the determination of fourth class cases, and Section 49 of the Act provides that the practice in cases of the fifth class shall be as near as may be the same as therein prescribed for civil cases of the fourth class. That the court has provided for written pleadings in such cases, see Rule 21 and Rule 20 (4) of the Municipal Court. Rule 21 expressly provides that "new parties may be added \* \* \* by order of the court, at any stage of the cause, \* \* \*." To the same effect are Sections 25 and 26 of the Civil Practice Act, and that such has been the holding of this court, see Grewenig v.

Except in the complaint the record does not once name Lester Simon, and not once does it name Milton Caliner except in the complaint as "Imp. Milton Caliner". The record is unique and unusual in that neither from the finding, the judgment nor the pleadings is it possible to tell with certainty who the judgment is against or whether it was the intention of the court to find one or both persons named in the complaint guilty of the violation of the ordinance.

In the first place, we think it is clear the court had no jurisdiction over Milton R. Caliner. No order was entered making him a party to the proceeding. No complaint was filed which named him as a violator of the ordinance. This was a case of the fifth class in the Municipal Court. (Ill. Rev. Stat., 1941, Chap. 37, § 2, p. 1044.) The City says that under Section 49 of the Municipal Court Act, which described the practice in cases of the fifth class, it was necessary to file any statement of claim. Section 49 of the Act in part provides:

"The issues shall be determined without other forms of written pleadings than those herein after expressly prescribed or provided for."

The fair construction of this section is that the forms of written pleadings provided in the statute or rules shall be followed. Section 40 of the Municipal Court Act provides that the court may make all rules necessary to the determination of fourth class cases, and Section 49 of the Act provides that the practice in cases of the fifth class shall be as near as may be the same as therein prescribed for civil cases of the fourth class. That the court has provided for written pleadings in such cases, see Rule 21 and Rule 20 (4) of the Municipal Court. Rule 21 expressly provides that "new parties may be added \* \* \* by order of the court, at any stage of the cause, \* \* \*". To the same effect are Sections 25 and 26 of the Civil Practice Act, and that such has been the holding of this court see *Green v.*



American Baking Co., 293 Ill. App. 604, 609. In that case we said: "The mode generally prescribed for bringing in new parties, after the court has made an order to such effect, appears to be by amending the complaint by adding the new parties together with such other amendments with respect to the allegations thereof as are necessary, and unless such new parties defendant enter an appearance to serve them with summons in the manner prescribed by statute."

It clearly follows that since no complaint or statement of claim was filed against Milton H. Callner, and since he was neither served with summons nor entered an appearance, the court was wholly without jurisdiction to pronounce judgment against him.

In the second place, it is contended in behalf of Lester Simon that the judgment is so uncertain in so far as he is concerned that it must be regarded as void. In 33 Corpus Juris 1197, it is stated: "A judgment must designate the parties for and against whom it is rendered, or it will be void for uncertainty."

This seems to state a general and elementary doctrine. In Niemeyer v. Berg, 186 Ill. App. 107, 108, which was a fourth class action in tort in the Municipal Court, there was a finding that the "defendant" was guilty in the manner and form as charged in plaintiff's statement of claim. Damages were assessed and judgment entered. On appeal we held that a judgment on such a finding could not be sustained because it was uncertain which one of the defendants was found guilty and against which one the judgment was rendered.

In O'Connor v. Mullen, 11 Ill. 116, 118, in an action for debt where there were two defendants, where one defendant alone was served and judgment entered by default against "defend-

American Bank Co., 244 Ill. App. 3d, 305. In that case it said: "The more generally prescribed for following in new parties, after the court has made an order to show cause, appears to be by amending the complaint by adding the new parties together with such other amendments with respect to the allegations therein of as are necessary, and unless such new parties defendant under an appearance to serve them with summons in the manner prescribed by statute."

It clearly follows that since no complaint or statement of claim was filed against Milton H. Gellner, and since he was neither served with summons nor entered an appearance, the court was wholly without jurisdiction to pronounce judgment against him.

In the second place, it is contended in behalf of Lester Simon that the judgment is so uncertain in so far as he is concerned that it must be regarded as void. In St. George Lumber Co. v. Lester Simon, 119 Ill. App. 3d, 119, it is stated: "A judgment must designate the parties for and against whom it is rendered, or it will be void for uncertainty."

This seems to state a general and elementary doctrine. In Hammer v. Berg, 188 Ill. App. 3d, 107, 108, which was a fourth class action in tort in the Municipal Court, there was a finding that the "defendants" was guilty in the manner and form as charged in plaintiff's statement of claim. Damages were assessed and judgment entered. On appeal we held that a judgment on such a finding could not be sustained because it was uncertain which one of the defendants was found guilty and against which one the judgment was rendered.

In O'Connor v. Miller, 13 Ill. 2d, 118, 119, in an action for debt where there were two defendants, where one defendant alone was served and judgment entered by default against "defendants"

ants" with final judgment that plaintiff recover from "defendant", the Supreme Court said it was error to enter a judgment by default against both defendants when only one had been served with process, and that a final judgment although against but one defendant, left it uncertain as to which defendant.

For the reasons indicated the judgment of February 5, 1941, and the order entered July 3, 1941, overruling motions of Simon and Callner to vacate the judgment, and that portion of the order entered July 9, 1941 denying the motion in arrest of judgment, will be reversed.

REVERSED.

McSurely, P. J., and O'Connor, J., concur.

with final judgment that plaintiff recover from defendant.

The Supreme Court said it was error to enter a judgment by default against both defendants when only one had been served with process, and that a final judgment should be entered against but one defendant, left it uncertain as to which defendant.

For the reasons indicated the judgment of February 5, 1941, and the order entered July 3, 1941, overruling motions of Simon and Galtner to vacate the judgment, and that portion of the order entered July 3, 1941 denying the motion in arrest of judgment, will be reversed.

REVERSED.

McGregory, P. J., and O'Connor, J., concur.

41488

DOWNNEY COAL COMPANY,  
a corporation,  
Appellant,

v.

THE LIVE STOCK NATIONAL BANK OF  
CHICAGO, a corporation, as  
Trustee under Trust No. 10893  
known as 75th & Colfax Building  
Liquidation Trust, A. EPSTEIN,  
HARRY S. SCHRAM and WILLIAM A.  
ROGAN, Trust Managers,  
Appellees.

41  
APPEAL FROM SUPERIOR  
COURT OF COOK COUNTY.

314 I.A. 566

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The trial court sustained a motion of defendants The Live Stock National Bank of Chicago, as Trustee, A. Epstein, and Harry S. Schram, as Trust Manager, to strike and dismiss the second amended complaint of plaintiff on the ground that it states no cause of action, and entered an order dismissing said complaint for want of equity. Plaintiff appeals. Defendant William A. Rogan, one of the Trust Managers, has not filed a brief in this court.

The verified second amended complaint alleges the following: That prior to February 15, 1928, Thomas H. Cochran and Fred E. Downey were the owners in fee simple of certain real estate located at the southwest corner of 75th street and Colfax avenue, Chicago, subject to a first mortgage to the Central Manufacturing District Bank of Chicago to secure \$200,000 of bonds; that Downey was president and a stockholder of plaintiff company; that by June 18, 1935, the principal of the mortgage was reduced to \$182,000; that prior to August, 1932, the said bank was taken over by the Auditor of Public Accounts and that a Bondholders' Committee was formed, consisting of A. Epstein, Chairman, and others; that Epstein, on March 21, 1933, filed a complaint in the Superior court of Cook county to foreclose the mortgage; that the Committee and Epstein then represented \$15,000 of the

41488

DOWNY COAL COMPANY,  
a corporation,  
Appellant.

A. and THOMAS E. DOWNY  
COUNT OF COOK COUNTY.

THE LIVE STOCK NATIONAL BANK OF  
CHICAGO, a corporation, as  
Trustee under Trust No. 10893  
known as 75th & Colfax Building  
Liquidation Trust, A. Epstein,  
HARRY S. SCHRAM and WILLIAM A.  
ROGAN, Trust Managers,  
Appellees.

MR. PRESIDING JUSTICE SEAVAN DELIVERED THE OPINION OF THE COURT.

The trial court sustained a motion of defendants The Live  
Stock National Bank of Chicago, as Trustee, A. Epstein, and Harry  
S. Schram, as Trust Manager, to strike and dismiss the second  
amended complaint of plaintiff on the ground that it states no  
cause of action, and entered an order dismissing said complaint  
for want of equity. Plaintiff appeals. Defendant William A.  
Rogan, one of the Trust Managers, has not filed a brief in this  
court.

The verified second amended complaint alleges the follow-  
ing: That prior to February 12, 1928, Thomas E. Downy and Wm  
E. Downy were the owners in fee simple of certain real estate  
located at the southwest corner of 75th street and Colfax avenue,  
Chicago, subject to a first mortgage to the Central Manufacturing  
District Bank of Chicago to secure \$200,000 of bonds; that Downy  
was president and a stockholder of plaintiff company; that by  
June 18, 1935, the principal of the mortgage was reduced to  
\$182,000; that prior to August, 1935, the said bank was taken  
over by the Auditor of Public Accounts and that a "bondholders'  
Committee was formed, consisting of A. Epstein, Chairman, and  
others; that Epstein, on March 21, 1937, filed a complaint in  
the Superior Court of Cook County to foreclose the mortgage;  
that the Committee and Epstein then represented \$17,000 of the

bonds, but that under the terms of the mortgage a minimum of twenty per cent, or \$37,000, of bonds was necessary to institute proper foreclosure proceedings; that the owners of the equity and the Committee had been negotiating upon a plan of reorganization; that as a result of the negotiations the Committee and the owners, on March 22, 1933, entered into the agreement attached to the complaint as Exhibit "A"; that this agreement, in short, provided that the owners shall convey the title to the real estate to the Committee, subject only to the first mortgage; that the Committee agreed to immediately put on a drive and "get all of the said bonds deposited with your Committee;" that when all the bonds were deposited the property was to be conveyed to The Live Stock National Bank of Chicago in a liquidating trust, in which the owners and the bondholders were to share, the owners receiving approximately nine per cent; that in the event of failure to get all the bonds deposited, the Committee was permitted to reconvey the real estate to the owners, or prosecute and complete a foreclosure without any deficiency judgment; that in the event the property was conveyed to the liquidating trust all liability of the owners on the bonds and coupons was to be cancelled; that William A. Rogan, attorney for the owners, and George F. Anderson, attorney for the Committee, should agree upon the terms of the liquidating trust in the event it should be considered advisable to deviate from the regular form; that this agreement was signed by the owners of the equity and the Committee; that the time limitation imposed by the agreement was extended indefinitely by the later agreement of March 30, 1935, signed by the same parties, and which is attached to the complaint as Exhibit "C"; that on March 22, 1933, the owners conveyed to a nominee of the Committee, and the Committee thereafter solicited the deposit of bonds; that from March 22, 1933, to February 23, 1935, the

of bonds, but that under the terms of the mortgage a sum of twenty per cent of \$27,000 of bonds was necessary to facilitate proper foreclosure proceedings; that the owners of the property and the Committee had been negotiating upon a plan of reorganization; that as a result of the negotiations the Committee and the owners, on March 22, 1933, entered into the agreement attached to the complaint as Exhibit "A"; that this agreement, in effect, provided that the owners shall convey the title to the real estate to the Committee, subject only to the first mortgage; that the Committee agreed to immediately put on a drive and "get all of the said bonds deposited with your Committee"; that when all the bonds were deposited the property was to be conveyed to The Five Stock National Bank of Chicago in a liquidating trust, in which the owners and the bondholders were to share, the owners receiving approximately nine per cent; that in the event of failure to get all the bonds deposited, the Committee was permitted to reconvey the real estate to the owners, or prosecute and complete a foreclosure without any deficiency judgment; that in the event the property was conveyed to the liquidating trust all liability of the owners on the bonds and coupons was to be cancelled; that William A. Hogan, attorney for the owners, and George F. Anderson, attorney for the Committee, should agree upon the terms of the liquidating trust in the event it should be considered advisable to deviate from the regular form; that this agreement was signed by the owners of the equity and the Committee; that the time limitation imposed by the agreement was extended indefinitely by the later agreement of March 30, 1933, signed by the same parties, and which is attached to the complaint as Exhibit "B"; that on March 22, 1933, the owners conveyed to a nominee of the Committee, and the Committee thereafter solicited the deposit of bonds; that from March 22, 1933, to February 23, 1935, the



Committee represented to the owners that it would soon obtain a deposit of all outstanding bonds, and it would likewise take all proper safeguards and protect them against any possible deficiency or liability on the outstanding bonds in the event it was not able to secure a one hundred per cent deposit; that on March 30, 1935, at the time of the waiver of the time limit, the Committee represented that if the foreclosure was completed and a sale held it was of the opinion that the entire issue of bonds would be deposited, and that in the event that the entire issue was not deposited, the non-depositing bondholders would be protected by subsequent provision in the Liquidation Trust Agreement; that the property was sold on April 11, 1935, for \$41,000, which was approximately twenty cents on the dollar, to the nominee of the Committee; that an immediate redemption was made and title obtained by the Committee; that on May 7, 1935, the said sale was approved without notice to any non-depositing bondholder, but in the order approving the sale the Committee had inserted a provision that bondholders might deposit their bonds with the Committee within ninety days; that at the time of the sale John G. Oglesby owned the bonds now held by plaintiff; that Oglesby was given no notice of the entry of the order of May 7, 1935, and the court obtained no jurisdiction of him or any other bondholder, and, in fact, the Plan of Reorganization was never submitted to the court; that on May 9, 1935, the Committee conveyed the title to The Live Stock National Bank as Trustee and had it issue its printed trust agreement on said date; that the printed Trust Agreement provided for the management of the real estate by three Trust Managers, A. Epstein, Harry S. Schram and William A. Rogan; that the said Agreement did not fully embrace all of the agreements of the parties and was not so intended, so a supplemental agreement of June 13, 1935, was made, which was signed by the Trust Managers and O.K.'d by the owners of the equity of

Committee represented to the owners that it would soon obtain a deposit of all outstanding bonds, and it would likewise take all proper safeguards and protect them against any possible delinquency or liability on the outstanding bonds in the event it was not able to secure a one hundred per cent deposit; that on March 30, 1935, at the time of the waiver of the time limit, the Committee represented that if the foreclosure was completed and a sale held it was of the opinion that the entire issue of bonds would be deposited, and that in the event that the entire issue was not deposited, the non-depositing bondholders would be protected by subsequent provision in the Liquidation Trust Agreement; that the property was sold on April 11, 1935, for \$41,000, which was approximately twenty cents on the dollar, to the nominee of the Committee; that an immediate redemption was made and title obtained by the Committee; that on May 7, 1935, the said sale was approved without notice to any non-depositing bondholder, but in the order approving the sale the Committee had inserted a provision that bondholders might deposit their bonds with the Committee within ninety days; that at the time of the sale John G. Oglesby owned the bonds now held by plaintiff; that Oglesby was given no notice of the entry of the order of May 7, 1935, and the court obtained no jurisdiction of him or any other bondholder, and, in fact, the Plan of Reorganization was never submitted to the court; that on May 9, 1935, the Committee conveyed the title to The Live Stock National Bank as Trustee and had it issue its printed trust agreement on said date; that the printed Trust Agreement provided for the management of the real estate by three Trust Managers, A. Epstein, Harry S. Schram and William A. Rogan; that the said Agreement did not fully embrace all of the agreements of the parties and was not so intended, so a supplemental agreement of June 13, 1935, was made, which was signed by the Trust Managers and O.K.'d by the owners of the equity of

redemption; that this amendment to the Liquidation Trust provided for the payment of certain expenses of reorganization and distribution of income, the placing of the management of the property with the Realty Renting Agency, and constituted the Realty Renting Agency as the representative of the Trust Managers and for the placing of insurance and active management of the property; and further for a certificate of beneficial interest for 448 units to be issued to The Live Stock National Bank of Chicago, as Trustee, representing \$22,400 of undeposited bonds; that specific non-depositing bondholders were mentioned by name, and the agreement continued: "If and when any of the said bonds are subsequently deposited, the Trustee shall issue a certificate of beneficial interest for a corresponding number of units to the bondholder making the deposit and reduce the above mentioned certificate issued to the Trustee by an equal number of units. In the event that any of the bonds are surrendered to the Live Stock National Bank by the holders thereof, for their pro rata share in the foreclosure sale price which has been deposited with The Live Stock National Bank, the Trustee shall cancel a corresponding number of units in the above mentioned certificate for 448 units issued to the Trustee and reduce the trust by a like number of units;" that this supplemental agreement constitutes a permanent amendment to the Liquidation Trust, and was entered into by the Trust Managers in order to comply with the reorganization agreement between the owners and the Bondholders' Committee; that on November 29, 1935, a letter was sent to the non-depositing bondholders by the Committee, including Oglesby, in which the bondholders were advised that January 1, 1936, was the absolute deadline within which bonds would be accepted for deposit; and that in the event that bonds were not deposited by January 1, 1936, the Committee would "wash out" non-depositing bondholders; that the Committee accepted bonds from January 4, 1936, to September 17, 1936, and on

redemption; and this amendment to the dividend plan was provided for the payment of certain expenses of organization and distribution of income, the placing of the management of the property with the Realty Building Agency, and constituted the Realty Building Agency as the representative of the Trust Managers and for the placing of insurance and active management of the property; and further for a certificate of beneficial interest for 448 units to be issued to The Five Stock National Bank of Chicago, as trustee, representing \$22,400 of undeposited bonds; that specific non-depositing bondholders were mentioned by name, and the agreement continued: "If and when any of the said bonds are subsequently deposited, the Trustee shall issue a certificate of beneficial interest for a corresponding number of units to the bondholder making the deposit and reduce the above mentioned certificate issued to the Trustee by an equal number of units. In the event that any of the bonds are surrendered to the Five Stock National Bank by the holders thereof, for their pro rata share in the liquidation sale price which has been deposited with the Five Stock National Bank, the Trustee shall cancel a corresponding number of units in the above mentioned certificate for 448 units issued to the Trustee and reduce the Trust by a like number of units;" that this supplemental agreement constitutes a permanent amendment to the Liquidation Trust, and was entered into by the Trust Managers in order to comply with the reorganization agreement between the owners and the Bondholders' Committee; that on November 29, 1935, a letter was sent to the non-depositing bondholders by the Committee, including Olesky, in which the bondholders were advised that January 1, 1936, was the absolute deadline within which bonds would be accepted for deposit; and that in the event that bonds were not deposited by January 1, 1936, the Committee would "wash out" non-depositing bondholders; that the Committee accepted bonds from January 4, 1936, to September 17, 1936, and on

September 17, 1936, the master certificate issued for the benefit of non-depositing bondholders was reduced from 448 units to 300 units; that in the latter part of 1936 Cochran and Downey were advised by the Committee that it had been unable to induce Oglesby to deposit \$10,000 of bonds owned and held by him, because Oglesby reported that he had been, since on or about September 1, 1936, prosecuting litigation against the Central Manufacturing District Bank and its Receiver; that he claimed that the Bondholders' Committee was an off-shoot or successor of certain factions of the Bank and feared that if he recognized the Committee and deposited his bonds with it he might jeopardize his claim against the Bank and its Receiver; that Oglesby's claim exceeded \$100,000; that thereafter the Committee and its attorney reported to Cochran and Downey that it was unable to obtain the deposit of the Oglesby bonds and requested that they take up negotiations with Oglesby; that they did so, and on March 27, 1937, plaintiff acquired Oglesby's bonds for one hundred cents on the dollar; that immediately after the acquisition of Oglesby's bonds plaintiff demanded that the Trust Managers exchange the bonds for certificates of beneficial interest, but Epstein and Schram, Trust Managers, from time to time evaded a determination as to whether they would accept the same for deposit until about sixty days before the filing of the complaint, when they declined; that on December 8, 1936, an offer was made by an outside purchaser who sought to purchase the property for \$165,000, a price which would net the depositing bondholders seventy-seven cents on the dollar; that pursuant to the offer Epstein and Schram proposed to liquidate the Trust and cancel the outstanding certificate for 300 units set up for non-depositing bondholders, but Rogan, the third Trust Manager, refused, maintaining that the outstanding certificate was irrevocable and not subject to cancellation by the Trust Managers; that in the communication sent to the bondholders, Trust Managers Epstein and Schram caused the Trustee to include a

September 17, 1936, the master certificate for the 300 units of no-depositing bondholders was received from the units to 300 units; that in the latter part of 1936 Schuman and Epstein were advised by the Committee that it had been unable to locate Galsky to deposit \$10,000 of bonds owned and held by him, but was Galsky reported that he had been, since on or about December 2, 1936, prosecuting litigation against the Central National Bank, District Bank and its Receiver; that in or about that time the bondholders Committee was an off-shoot or successor of certain members of the Bank and feared that if he recognized the Committee and its activities his bonds with it he might jeopardize his claim; that the Bank and its Receiver; that Galsky's claim exceeded \$100,000; that after the Committee and its attorney report to Schuman and Epstein that it was unable to obtain the deposit of the Galsky bonds and requested that they take no negotiations with Galsky; that they did so, and on March 27, 1937, Galsky received 300 units of bonds for one hundred cents on the dollar; that immediately after the acquisition of Galsky's bonds Galsky demanded that the Trust Managers exchange the bonds for certificates of beneficial interest but Epstein and Schuman, Trust Managers, from time to time evaded a determination as to whether they would accept the same for deposit until about sixty days before the filing of the complaint, when they declined; that on December 2, 1936, an offer was made by an outside purchaser who sought to purchase the property for \$100,000, a price which would net the depositing bondholders seventy-seven cents on the dollar; that pursuant to the offer Epstein and Schuman proposed to liquidate the Trust and cancel the outstanding certificates for 300 units set up for non-depositing bondholders, but before, the third Trust Manager, refused, maintaining that the outstanding certificate was irrevocable and not subject to cancellation by the Trust Managers; that in the communication sent to the bondholders, Trust Managers Epstein and Schuman caused the Trustee to include a

copy of a letter received by the Trustee and written by Epstein and Schram; that in this letter it is stated as follows: "Based on the above calculations, the Certificate Holders of the 3,683 units of Beneficial Interest should receive an immediate cash settlement of approximately 77 cents on the dollar. \* \* \* You are hereby authorized to close the Trust and cancel certificate for 300 units issued in the name of The Live Stock National Bank, Trustee, covering non-deposited bonds of this issue;" that within twenty days after December 8, 1936, the holders of 1,741 units rejected the sale and the proposed modification of the trust; that on February 18, 1937, an additional offer for the sale of the property was received and a similar communication was sent by the Trustee to the bondholders; that this communication contained the same language: "Based on the above calculations, the certificate holders of 3,683 units of beneficial interest should receive cash settlement of approximately 80 cents on the dollar. \* \* \* You are hereby authorized to close the trust and cancel the certificate for 300 units issued in the name of The Live Stock National Bank, Trustee, covering non-deposited bonds of this issue;" that within twenty days after the receipt of that communication the holders of 1,531 units rejected the proposed sale and proposed amendment, and likewise the attempt of Epstein and Schram to liquidate the Trust and cancel the outstanding certificate; that since the establishment of the trust and particularly since June 13, 1935, the rights of all parties interested in the 75th and Colfax Building have remained unchanged, except that certain expenses in the reorganization have been paid from the rents, and dividends have been paid unit-holders; that all expenses of the reorganization have been paid out of the rents and no individual bondholder nor the Committee has personally advanced any money toward the reorganization; that in addition to paying all expenses unit-holders have been paid about four per cent a year for the past two years; that the Realty

copy of a letter received by the Trustee and written by Epstein and Schram; that in this letter it is stated as follows: "Based on the above calculations, the Certificate Holders of the 3,083 units of Beneficial Interest should receive an immediate cash settlement of approximately 77 cents on the dollar. \* \* \* You are hereby authorized to close the Trust and cancel certificates for 300 units issued in the name of The Live Stock National Bank, Trustee, covering non-deposited bonds of this issue;" that within twenty days after December 8, 1936, the holders of 1,741 units rejected the sale and the proposed modification of the trust; that on February 18, 1937, an additional offer for the sale of the property was received and a similar communication was sent by the Trustee to the bondholders; that this communication contained the same language: "Based on the above calculations, the certificate holders of 3,083 units of Beneficial Interest should receive cash settlement of approximately 90 cents on the dollar. \* \* \* You are hereby authorized to close the trust and cancel the certificate for 300 units issued in the name of The Live Stock National Bank, Trustee, covering non-deposited bonds of this issue;" that within twenty days after the receipt of that communication the holders of 1,731 units rejected the proposed sale and proposed amendment, and likewise the attempt of Epstein and Schram to liquidate the Trust and cancel the outstanding certificates; that since the establishment of the trust and particularly since June 13, 1935, the rights of all parties interested in the 75th and Colfax Building have remained unchanged, except that certain expenses in the reorganization have been paid from the rents, and dividends have been paid unit-holders; that all expenses of the reorganization have been paid out of the rents and no individual bondholder nor the Committee has personally advanced any money toward the reorganization that in addition to paying all expenses unit-holders have been paid about four per cent a year for the past two years; that the Realty



Renting Agency, the managing agent designated by the agreement of June 13, 1935, is a corporation in which Epstein and Schram are interested as stockholders and from which they have received certain dividends, and that plaintiff asks an accounting by them of all dividends received from this source; and plaintiff prays that "said The Live Stock National Bank of Chicago, a corporation, as Trustee under Trust Number 10893, known as the 75th and Colfax Building Liquidation Trust, may be compelled by order and direction of this court, to issue to this plaintiff, units of beneficial interest in the 75th and Colfax Building Liquidation Trust and being Number 10893 of The Live Stock National Bank of Chicago, in proportion to the bonds owned and held by it, and being one unit for every Fifty Dollars of principal of the bonds owned and held by this plaintiff, to-wit: One Hundred units; that the said The Live Stock National Bank of Chicago, a corporation, as Trustee under Trust Number 10893, etc., or the said Trust Managers, shall be compelled to pay to plaintiff the distribution of the income upon the same basis and in like proportion to that previously paid to other beneficial certificate holders, who had been permitted by said Trustee to have their bonds exchanged for beneficial certificates or units," etc.

Plaintiff states that the purpose of the complaint is "to compel the Reorganization Trustee and the Trust Managers to accept the bonds for deposit on the same basis as other bondholders and to issue beneficial certificates in exchange for its said bonds."

Plaintiff's major contention is that "the Supplement of June 13, 1935, sets up a permanent trust for the benefit of non-depositing bondholders unless the plaintiff is estopped by its conduct from claiming the benefit of the trust or laches bars its claims." The defendants who have filed a brief in this court contend that "the letter of June 13, 1935, does not set up a Trust, permanent or otherwise, for the benefit of non-depositing bondholders. It is merely a necessary instruction to the trustee as to its duties under

renting agency, the managing agent designated by the agreement of June 13, 1935, is a corporation in which Epstein and Johnson are interested as stockholders and from which they have received certain dividends, and that plaintiff sets on account of all dividends received from this source; and plaintiff prays that "said The Live Stock National Bank of Chicago, a corporation, as trustee under Trust Number 10893, known as the 75th and Colfax Building Liquidation Trust, may be compelled by order and direction of this court, to issue to this plaintiff, units of beneficial interest in the 75th and Colfax Building Liquidation Trust and being Number 10893 of The Live Stock National Bank of Chicago, in proportion to the bonds owned and held by it, and being one unit for every fifty dollars of principal of the bonds owned and held by this plaintiff, to-wit: One Hundred units; that the said The Live Stock National Bank of Chicago, a corporation, as Trustee under Trust Number 10893, etc., or the said Trust Managers, shall be compelled to pay to plaintiff the distribution of the income upon the same basis and in like proportion to that previously paid to other beneficial certificate holders, who had been permitted by said Trustee to have their bonds exchanged for beneficial certificates or units," etc.

Plaintiff states that the purpose of the complaint is "to compel the Reorganization Trustee and the Trust Managers to accept the bonds for deposit on the same basis as other bondholders and to issue beneficial certificates in exchange for its said bonds."

Plaintiff's major contention is that "the Supplement of June 13, 1935, sets up a permanent trust for the benefit of non-depositing bondholders unless the plaintiff is estopped by its conduct from claiming the benefit of the trust or loses said its claims." The defendants who have filed a brief in this court contend that "the letter of June 13, 1935, does not set up a Trust, permanent or otherwise, for the benefit of non-depositing bondholders. It is merely a necessary instruction to the trustee as to its duties under

the Liquidation Trust Agreement." Plaintiff's case is necessarily based upon its assumption that the letter of June 13, 1935, set up a permanent trust for the benefit of non-depositing bondholders.

On May 7, 1935, the sale under the foreclosure decree was approved, and non-depositing bondholders were given ninety days within which to deposit their bonds and accept the benefit of the purchase of the property at foreclosure. On May 9, 1935, the Bondholders' Committee and The Live Stock National Bank of Chicago, defendant, executed the Liquidation Trust Agreement, by which the Bank was made Trustee, and the title to the real estate was conveyed to the Bank under its Trust No. 10893. Under the Agreement, Epstein, Schram and Rogan were appointed Trust Managers, and the management of the Trust was placed in them, "it being the intention hereof that the affairs of this trust shall, except as herein otherwise specifically provided, be directed in all things by such Trust Managers," and that the action of a majority of the Trust Managers shall be binding upon the Trustee. While the Agreement does not specify the duties of the Trustee in reference to the property, it does provide, as we have heretofore stated, that the Trustee shall be bound to comply with the instructions of the Trust Managers. It provides: "Upon the written direction of the Trust Managers, the Trustee shall prepare a book containing forms of certificates of interest, and the Trustee shall issue and deliver such certificates of interest for such total number of units, and to such persons, and in such amounts, as the Trust Managers and the Bondholders Committee may direct;" that upon the issuance of such certificate or certificates of interest, the Certificate of Beneficial Interest issued to the Bondholders' Committee is to become void and of no effect and is to be surrendered and canceled by the Trustee. The letter of June 13, 1935, provides for the issuance of Certificates of Beneficial Interest, and contains a statement of the existing indebtedness of the property and the proposed method of its retirement, provisions

the liquidation Trust Agreement." Plaintiff's case is necessarily based upon its assumption that the letter of June 13, 1935, set up a permanent trust for the benefit of non-depositing bondholders. On May 7, 1935, the sale under the foreclosure notice was approved, and non-depositing bondholders were given ninety days within which to deposit their bonds and receive the benefit of the purchase of the property at foreclosure. On May 9, 1935, the Bondholders' Committee and The Live Stock National Bank of Chicago, defendant, executed the liquidation Trust Agreement, by which the Bank was made Trustee, and the title to the real estate was conveyed to the Bank under its Trust No. 10893. Under the agreement, Webster Graham and Hogan were appointed Trust Managers, and the management of the Trust was placed in them, "it being the intention hereof that the affairs of this trust shall, except as herein otherwise specifically provided, be directed in all things by such Trust Managers," and that the action of a majority of the Trust Managers shall be binding upon the Trustee. While the agreement does not specify the duties of the Trustee in reference to the property, it does provide, as we have heretofore stated, that the Trustee shall be bound to comply with the instructions of the Trust Managers. It provides: "Upon the written direction of the Trust Managers, the Trustee shall prepare a book containing forms of certificates of interest, and the Trustee shall issue and deliver such certificates of interest for such total number of units, and to such persons, and in such amounts, as the Trust Managers and the Bondholders Committee may direct;" that upon the issuance of such certificate or certificates of interest, the Certificate of Beneficial Interest issued to the Bondholders' Committee is to become void and of no effect and is to be surrendered and canceled by the Trustee. The letter of June 13, 1935, provides for the issuance of Certificates of Beneficial Interest, and contains a statement of the existing indebtedness of the property and the proposed method of its retirement, provisions

for the issuance of certificates of indebtedness, distribution of net income, management, taxes, the kinds and amounts of insurance to be carried, and a direction to issue lists of certificate holders and to render statements. The following are the provisions in reference to the issuance of Certificates of Beneficial Interest:

"1. Certificates of Beneficial Interest

"The 75th & Colfax Building Liquidation Trust was set up for Four Thousand Fifteen units of \$50.00 each. The Trustee is hereby authorized and instructed:

"To cancel bond No. 261 of the 75th & Colfax Building 6% First Mortgage Real Estate Gold Bond issue, due February 15, 1935, with February 15, 1933 and subsequent interest coupons attached.

"To cancel ten units in the liquidation trust, reducing the outstanding number of units from four thousand fifteen to four thousand five.

"The outstanding units in the Trust shall be issued as follows:

"(1) Certificates of beneficial interest for two thousand eight hundred seventy-two units, which the Trustee is authorized to exchange for certificates of deposit now outstanding on the 75th & Colfax Building on the basis of one unit for each \$50.00 face value of the bonds.

"(2) One certificate of beneficial interest for ten units, to be issued to Wm. L. O'Connell, Receiver, Central Manufacturing District Bank, 7 South Dearborn Street, Chicago, Illinois, and to be delivered to Wm. L. O'Connell, Receiver in exchange for the \$50.00 bond of the 75th & Colfax Building held by the said Wm. L. O'Connell, Receiver, which bond has not been deposited with the Live Stock National Bank, depository, it being expressly understood that the above mentioned bond will be delivered to the Trustee or to the Committee.

"(3) Certificate of beneficial interest for three hundred ten units, to be issued to Trustees, Central Manufacturing District

for the issuance of certificates of indebtedness, distribution of net income, management, taxes, the kinds and amounts of insurance to be carried, and a direction to issue lists of certificate holders and to render statements. The following are the provisions in reference to the issuance of Certificates of Beneficial Interest:

"1. Certificates of Beneficial Interest

"The 7th & Colfax Building Liquidation Trust was set up for four thousand fifteen units of \$50.00 each. The Trustee is hereby authorized and instructed:

"To cancel bond No. 261 of the 7th & Colfax Building 1st Mortgage Real Estate Gold Bond issue, due February 15, 1935, with February 15, 1935 and subsequent interest coupons attached.

"To cancel ten units in the liquidation trust, reducing the outstanding number of units from four thousand fifteen to four thousand five.

"The outstanding units in the trust shall be issued as follows:

"(1) Certificates of beneficial interest for two thousand eight hundred seventy-two units, which the Trustee is authorized to exchange for certificates of deposit now outstanding on the 7th & Colfax Building on the basis of one unit for each \$50.00 face value of the bonds.

"(2) One certificate of beneficial interest for ten units, to be issued to Wm. D. O'Connell, Receiver, Central Manufacturing District Bank, 7 South Dearborn Street, Chicago, Illinois, and to be delivered to Wm. D. O'Connell, Receiver in exchange for the \$50.00 bond of the 7th & Colfax Building held by the said Wm. D. O'Connell, Receiver, which bond has not been deposited with the Live Stock National Bank, depository, it being expressly understood that the above mentioned bond will be delivered to the Trustee or to the Committee.

"(3) Certificate of beneficial interest for three hundred ten units, to be issued to Trustee, Central Manufacturing District

in exchange for the \$15,500.00 bonds of the 75th & Colfax Building held by the said Trustees, it being expressly understood that the above mentioned bonds will be delivered to the Trustee or to the Committee.

"(4) Certificates of beneficial interest aggregating three hundred sixty-five units, as follows: (Due equity owner under agreement for title)

"18 certs for ten units each, total one hundred eighty units, to Ruth E. Downey;

"1 certificate for two units, to Ruth E. Downey;

"18 certificates for ten units each, total one hundred eighty units, to Thomas H. Cochran;

"1 certificate for two units, to Thos. H. Cochran;

"1 certificate for one unit, to William C. Burns

"The said certificates to be delivered to Anderson & Anderson, 69 West Washington Street, Chicago, Illinois

"(5) Certificate of beneficial interest for four hundred forty-eight units, to be issued to The Live Stock National Bank of Chicago, Trustee under Trust No. 10893, representing the twenty-two thousand four hundred dollars undeposited bonds of this issue (other than those mentioned in paragraphs 2 and 3 above), said undeposited bonds being as follows:

"(75th & Colfax Building)

| Amount    | Name of Owner     | Address of Owner                                        | Bond No. |
|-----------|-------------------|---------------------------------------------------------|----------|
| \$ 100.00 | Rose Berg         | 2917 Lyman St.                                          | 160      |
| 500.00    | Christ Budde      | 3122 S. Morgan St.                                      | 403      |
| 500.00    | Margaret Durkin   | 6522 S. Maplewood Ave.                                  | 328      |
| 1,000.00  | Michael Durkin    | 600 Maryland St., Gary, Ind.                            | 326,327  |
| 200.00    | Mildred E. French | 3901 N. Hoyne Ave.                                      | 242,130  |
| 100.00    | Frank Grudis      | 5747 S. Morgan St.                                      | 223      |
| 200.00    | Maria Heftowski   | 3222 Wall St.                                           | 213,147  |
| 500.00    | Della Hobert      | 834 E. 80th St.                                         | 286      |
| 200.00    | Chas. Kalczinski  | Telsiu Aps., Alsedziu Pastas, Brevikiu Kaimo, Lithuania | 14,142   |
| 1,000.00  | Antonia Kuffel    | 2019 W. 41st Pl.                                        | 177,179  |
| 2,000.00  | Barbara Kuncienie | 3326 S. Lithuania Ave.                                  | 469,470  |
| 100.00    | Frank Lepszynski  | 3356 S. Wall St.                                        | 131      |

in exchange for the \$1,000.00 bonds of the First National Bank of Chicago, it being agreed that the above mentioned bonds will be delivered to the Committee, or to the Committee,

"(4) Certificates of beneficial interest representing three hundred sixty-five units, as follows: (a) thirty units under agreement for title)

"10 cents for ten units each, total one hundred thirty units, to Ruth E. Downey;

"1 certificate for two units, to Ruth E. Downey;

"10 certificates for ten units each, total one hundred thirty units, to Thomas L. Cochran;

"1 certificate for one unit, to William C. Burns;

"The said certificates to be delivered to Anderson & Anderson, 69 West Washington Street, Chicago, Illinois

"(5) Certificate of beneficial interest for four hundred forty-eight units, to be issued to The First National Bank of Chicago, Trustee under Trust No. 10392, representing the twenty-two thousand four hundred dollars deposited bonds of this issue (other than those mentioned in paragraphs 2 and 3 above), said undeposited bonds being as follows:

"(List of Owners)

| Amount    | Name of Owner     | Address of Owner             | Bond No. |
|-----------|-------------------|------------------------------|----------|
| \$ 100.00 | Rose Berg         | 2917 Lyman St.               | 110      |
| 500.00    | Christ Bridge     | 1122 S. Morgan St.           | 403      |
| 500.00    | Margaret Durkin   | 522 S. Washington Ave.       | 378      |
| 1,000.00  | Michael Durkin    | 600 Maryland St., Gary, Ind. | 326, 327 |
| 200.00    | Mildred B. French | 3001 W. Hoyne Ave.           | 42, 130  |
| 100.00    | Frank Grulis      | 3747 S. Morgan St.           | 133      |
| 200.00    | Laria Hofowski    | 3222 Neil St.                | 11, 148  |
| 500.00    | Della Robert      | 834 S. 80th St.              | 130      |
| 200.00    | Chas. Kalcinski   | Talcott Ave., Alhambra, Cal. |          |
|           |                   | Pattee, Brooklyn, Cal.       |          |
|           |                   | Michigan                     |          |
| 1,000.00  | Antonia Kufel     | 2019 E. 41st St.             | 14, 148  |
| 2,000.00  | Barbara Kucienka  | 3326 E. Alhambra Ave.        | 11, 148  |
| 100.00    | Frank Lepczynski  | 3326 E. Wall St.             | 131      |



|           |                                           |                                 |            |
|-----------|-------------------------------------------|---------------------------------|------------|
| 10,000.00 | John G. Oglesby                           | Elkhart (Logan Co.)             | 391 to 399 |
|           |                                           | Ill.                            | 302 to 312 |
| 100.00    | George Rosner                             | 3021 Bonfield St.               | 143        |
| 500.00    | Antonette Socha<br>or Genevieve<br>Morgan | 1238 W. 31st St.                | 355        |
| 100.00    | Walter or Anna<br>Smiehowski              | 3326 Mosspratt St.              | 102        |
| 1,000.00  | Walter Ulanski                            | 3027 Bonfield St.               | 479        |
| 200.00    | Jos. Vitale                               | 2712 W. Polk St.                | 154,155    |
| 1,000.00  | Mary Widurgiris                           | 4 W. Jackson Blvd.,<br>Oak Park | 330,331    |
| 1,000.00  | Bernice Wicklinski                        | 948 W. 32nd St.                 | 425,428    |
| 1,000.00  | Mrs. Helen<br>Wroblewski                  | 4748 S. Keeler Ave              | 478        |
| 500.00    | Frank Jimmy                               | 5245 S. Racine Ave.             | 421        |
| 500.00    | L. J. McNamara                            | 2728 East 77th St.              | 173        |
| 100.00    | M.C. Kelly (?)                            | 1655 Carmen Ave. (?)            | 204        |

\$22,400.00

"If and when any of said bonds are subsequently deposited, the Trustee shall issue a certificate of beneficial interest for a corresponding number of units to the bondholder making the deposit and reduce the above mentioned certificate issued to the Trustee by an equal number of units.

"In the event that any of the bonds are surrendered to the Live Stock National Bank by the holders thereof for their pro rata share in the foreclosure sale price which has been deposited with The Live Stock National Bank, the Trustee shall cancel a corresponding number of units in the above mentioned certificate for 448 units issued to the Trustee and reduce the Trust by a like number of units."

We agree with defendants' contention that the Trustee would have been unable to function under the provisions of the Trust Agreement, alone, and we also agree with their interpretation of the letter of June 13, 1935, that by it, the Trust Managers, upon whom devolved the duty to manage the Trust, gave instructions to the Trustee to perform certain duties, thereby enabling the Trustee to function as to said duties. When this letter was written the non-depositing bondholders had, by the decree entered by the court, until August 9, 1935, to deposit their bonds and

|            |                    |            |                    |            |
|------------|--------------------|------------|--------------------|------------|
| 10,000.00  | John J. Wolsky     | 10,000.00  | Edward (Robert C.) | 391 to 399 |
| 100.00     | George Rosner      | 301 to 315 |                    |            |
| 100.00     | Antonia Rosner     | 145        |                    |            |
|            | or Genevieve       |            |                    |            |
|            | Morgan             |            |                    |            |
| 100.00     | Walter or Anna     |            |                    |            |
|            | Walslow            |            |                    |            |
| 1,000.00   | Walter Ulanicki    |            |                    |            |
| 200.00     | Joe Wile           |            |                    |            |
| 1,000.00   | Harry Wurgis       |            |                    |            |
|            |                    |            |                    |            |
| 1,000.00   | Gertrude Wiskinski |            |                    |            |
| 1,000.00   | Mrs. Helen         |            |                    |            |
|            | Wolowski           |            |                    |            |
| 500.00     | Frank Winsky       |            |                    |            |
| 500.00     | L. J. Wolkstein    |            |                    |            |
| 100.00     | M.C. Kelly (?)     |            |                    |            |
| <hr/>      |                    |            |                    |            |
| 425,400.00 |                    |            |                    |            |

"If and when any of said bonds are subsequently deposited, the Trustee shall issue a certificate of beneficial interest for a corresponding number of units to the depositor making the deposit and reduce the above mentioned certificate issued to the Trustee by an equal number of units.

"In the event that any of the bonds are surrendered to the Five Stock National Bank by the holders thereof for their pro rata share in the foreclosure sale price which has been deposited with The Five Stock National Bank, the Trustee shall cancel a corresponding number of units in the above mentioned certificate for 448 units issued to the Trustee and reduce the trust by a like number of units."

We agree with defendant's contention that the Trustee would have been unable to function under the provisions of the Trust Agreement, alone, and we also agree with their interpretation of the letter of June 13, 1935, that by it, the Trust Managers, upon whom devolved the duty to manage the Trust, gave instructions to the Trustee to perform certain duties, thereby enabling the Trustee to function as to said duties. When this letter was written the non-depositing bondholders had, by the dates entered by the court, until August 9, 1935, to deposit their bonds and

accept the benefit of the Trust, but it was necessary to make some provision for the issuance of certificates to the bondholders who deposited within the specified time; therefore, the Trust Managers directed the Trustee to issue to itself a certificate for 448 units out of which new certificates to subsequent depositors could be made. The instructions were intended to carry out the provisions in the decree as to bondholders who had not deposited their bonds. Plaintiff argues that "the supplemental agreement of June 13, 1935, constitutes a permanent amendment to the Liquidation Trust, and was entered into by the Trust Managers in order to comply with the reorganization agreement between the owners and the Bondholders' Committee and could not be changed at the will of the Trust Managers." As we interpret the letter, it conforms to the Liquidation Trust Agreement of May 9, 1935, and it did not set up a permanent trust for the benefit of non-depositing bondholders. We cannot agree with plaintiff's argument that the Trust Managers, after they gave to the Trustee the directions contained in the letter, had no power thereafter to revoke the directions or to give new or different instructions for the guidance of the Trustee. Nor can we agree with the further argument that after the Trust Managers had written the letter of June 13, 1935, nothing but the Statute of Limitations, after notice to every non-depositing bondholder, could terminate the right of non-depositing bondholders to deposit their bonds. The contention of plaintiff, in our judgment, is without merit.

Plaintiff contends that "the effect of enforcing the directions of the Trust Managers to close the Trust as of December 3, 1936, amounted in law to a forfeiture of bondholders' existing rights." It appears from the complaint that plaintiff acquired the bonds from Oglesby on March 27, 1937, two years after the foreclosure, and paid to Oglesby the full face value of the bonds although the best offer that had been received for the property would not the bondholders

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only eighty cents on the dollar. Cochran and Downey were the owners of the property, and Downey is president, a director and a stockholder of the plaintiff company. Rogan, a defendant and one of the Trust Managers, acted for plaintiff in purchasing the bonds from Oglesby. From March 22, 1933, until September, 1936, great efforts were made to obtain the deposit of bonds, first through the Committee and then through the Trustee under the Liquidation Trust. After March 22, 1933, "the Committee did put on a drive, but it was unable to obtain a deposit of all or a greater portion of the bonds, within six months of the agreement of March 22, 1933. From March 22, 1933, until July, 1935, the Committee requested additional time, and various extensions were granted by the owners to the Committee in writing." "During the time between March 22, 1933, and February 25, 1935, the said Committee constantly represented to the owners (Cochran and Downey) that it was rapidly proceeding with the reorganization of the building and would, without a doubt, obtain the deposit of all the outstanding bonds; that said Committee likewise, during said period, represented that it was necessary that the foreclosure be completed and various other devices used in order to obtain a complete deposit of the outstanding bonds." It further appears that a notice was mailed to each non-depositing bondholder on May 7, 1935, notifying him that in the order approving the foreclosure sale he had been given ninety days within which to deposit his bonds; that on or about November 29, 1935, a letter was sent to each non-depositing bondholder, including Oglesby, urging him to deposit his bonds and setting a final deadline of January 1, 1936; that about December 3, 1936, Epstein and Schram, two of the Trust Managers, directed the Trustee to close the Trust and to cancel the remainder of the certificate that had been issued to itself; that this certificate, originally for 448 units, had then been reduced to 300 units; that the certificate was thereupon canceled by the

only eighty cents on the dollar. Cochran and Downey were the owners of the property, and Downey is president, a director and a stockholder of the plaintiff company. Rosen, a defendant and one of the Trust Managers, acted for plaintiff in purchasing the bonds from Oglesby. From March 22, 1933, until September, 1936, great efforts were made to obtain the deposit of bonds, first through the Committee and then through the Trustee under the Liquidation Trust. After March 22, 1933, "the Committee did put on a drive, but it was unable to obtain a deposit of all or a greater portion of the bonds, within six months of the agreement of March 22, 1933. From March 22, 1933, until July, 1935, the Committee requested additional time, and various extensions were granted by the owners to the Committee in writing." "During the time between March 22, 1933, and February 25, 1935, the said Committee constantly represented to the owners (Cochran and Downey) that it was rapidly proceeding with the reorganization of the building and would, without a doubt, obtain the deposit of all the outstanding bonds; that said Committee likewise, during said period, represented that it was necessary that the foreclosure be completed and various other devices used in order to obtain a complete deposit of the outstanding bonds." It further appears that a notice was mailed to each non-depositing bondholder on May 7, 1935, notifying him that in the order approving the foreclosure sale he had been given ninety days within which to deposit his bonds; that on or about November 29, 1935, a letter was sent to each non-depositing bondholder, including Oglesby, urging him to deposit his bonds and setting a final deadline of January 1, 1936; that about December 3, 1936, Epstein and Schram, two of the Trust Managers, directed the Trustee to close the Trust and to cancel the remainder of the certificate that had been issued to itself; that this certificate, originally for 448 units, had then been reduced to 300 units; that the certificate was thereupon canceled by the

Trustee on December 7, 1936. Rogan refused to join Epstein and Schram as Trust Managers in giving the instruction to close the Trust. The complaint alleges that in the fall of 1936 the Bondholders' Committee requested Cochran, Downey and Rogan to try to get the Oglesby bonds in. The complaint does not state the date of the request, but alleges that during the latter part of the year 1936 Cochran and Downey were advised by the Committee that it had been unable to induce Oglesby to deposit his bonds; "that thereafter the said Committee and its attorney \* \* \* requested that the attorney for said Cochran and Downey endeavor to induce the said Oglesby to deposit his bonds;" that "after many months of negotiation, the said bonds were acquired by this plaintiff March 27, 1937 from \* \* \* Oglesby." The complaint shows that Oglesby had been solicited many times to deposit his bonds but that he always refused to do so and that he never did deposit his bonds nor offer to deposit them. The complaint alleges that he stated that he did not care to deposit his bonds because if he did deposit them it might jeopardize a claim he had against the Central Manufacturing District Bank and its Receiver for over \$100,000. It is a reasonable inference from the facts alleged that Oglesby expected, in any event, to collect his bonds from Downey and Cochran, the owners of the property, and he finally did receive the face value of his bonds from plaintiff corporation, of which Downey was the president, a director and a stockholder. If Oglesby were the plaintiff in this proceeding he could not justly complain that the trust was finally closed against him, and even if it could be assumed that some sort of a new right was given the bondholders who had not deposited their bonds by the letter of June 13, 1935, that fact would avail Oglesby nothing in view of the attitude that he had constantly assumed. Plaintiff, who claims to stand in the shoes of Oglesby, had no greater rights against the Trust or the Trust Managers than Oglesby had on March 27, 1937. Indeed, plaintiff was represented in the purchase of the Oglesby

Indeed, plaintiff was represented in the purchase of the Oglesby Trust or the Trust Managers than Oglesby had on March 27, 1937. to stand in the shoes of Oglesby, had no greater rights against the the attitude that he had constantly assumed. Plaintiff, who claims of June 13, 1935, that fact would avail Oglesby nothing in view of given the bondholders who had not deposited their bonds by the letter and even if it could be assumed that some sort of a new right was not justly complain that the trust was finally closed against him, holder. If Oglesby were the plaintiff in this proceeding he could corporation, of which Downey was the president, a director and a stock- finally did receive the face value of his bonds from plaintiff cor- bonds from Downey and Cochran, the owners of the property, and he facts alleged that Oglesby expected, in any event, to collect his Receiver for over \$100,000. It is a reasonable inference from the he had against the Central Manufacturing District Bank and its complaint alleges that he stated that he did not care to deposit his bonds because if he did deposit them it might jeopardize a claim that he never did deposit his bonds nor offer to deposit them. The times to deposit his bonds but that he always refused to do so and Oglesby." The complaint shows that Oglesby had been solicited many bonds were acquired by this plaintiff March 27, 1937 from \* \* \* deposit his bonds; that "after many months of negotiation, the said for said Cochran and Downey endeavor to induce the said Oglesby to the said Committee and its attorney \* \* \* requested that the attorney been unable to induce Oglesby to deposit his bonds; "that thereafter 1936 Cochran and Downey were advised by the Committee that it had of the request, but alleges that during the latter part of the year to get the Oglesby bonds in. The complaint does not state the date Bondholders' Committee requested Cochran, Downey and Hogan to try Trust. The complaint alleges that in the fall of 1936 the Schram as Trust Managers in giving the instruction to close the Trustee on December 7, 1936. Hogan refused to join Schram and



bonds by an able, experienced lawyer, who, as one of the Trust Managers, was thoroughly familiar with the situation, and his knowledge is the knowledge of plaintiff. After a careful consideration of the allegations of the complaint we are unable to find any real equities in favor of plaintiff. The complaint shows conclusively that the Trust Managers were anxious and willing to have all bondholders deposit their bonds, and it is idle to argue that their order to the Trustee to close the Trust was in the nature of a forfeiture of Oglesby's rights. We are not unmindful of the fact that the complaint alleges that the Bondholders' Committee, in the latter part of 1936, requested Cochran and Downey to take up negotiations with Oglesby with a view to have him deposit his bonds. But in our consideration of the alleged request we have also considered certain material facts that bear upon the request: (1) The Bondholders' Committee (the members of which were not made parties to this suit) had nothing to do with the management of the Trust in December, 1936, nor in March, 1937; and (2) Rogan, as one of the Trust Managers, knew that the Trust had been closed in December, 1936, which was long prior to the time when he bought the bonds from Oglesby for plaintiff. The second amended complaint, filed April 29, 1940, alleges that plaintiff "for the past two years has repeatedly demanded" that the defendants accept the bonds owned by plaintiff and issue to it, in lieu thereof, beneficial certificates on the same basis as to other bondholders. From the aforesaid allegations it must be assumed that the first demand made by plaintiff upon the Trustee to accept the bonds and issue beneficial certificates therefor was made not earlier than April 29, 1938, which was more than a year after the bonds were purchased from Oglesby, and more than a year and four months after the closing of the Trust.

Plaintiff contends: (1) "If Epstein and Schram, the majority of the Trust Managers, have received dividends as stockholders of the

bonds by an able, experienced lawyer, who, as one of the Trust

Managers, was thoroughly familiar with the situation, and his

knowledge is the knowledge of plaintiff. After a careful consider-

ation of the allegations of the complaint we are unable to find any

real equities in favor of plaintiff. The complaint shows conclusive-

ly that the Trust Managers were anxious and willing to have all bond-

holders deposit their bonds, and it is idle to argue that their order

to the Trustee to close the Trust was in the nature of a tortious

of O'Leary's rights. We are not unmindful of the fact that the

complaint alleges that the Bondholders' Committee, in the latter

part of 1936, requested Cochran and Brown to take up negotiations

with O'Leary with a view to have him deposit his bonds. But in our

consideration of the alleged request we have also considered certain

material facts that bear upon the request: (1) The Bondholders'

Committee (the members of which were not made parties to this suit)

had nothing to do with the management of the Trust in December, 1936,

nor in March, 1937; and (2) Hogan, as one of the Trust Managers, knew

that the Trust had been closed in December, 1936, which was long prior

to the time when he bought the bonds from O'Leary for plaintiff. The

second amended complaint, filed April 29, 1940, alleges that plain-

tiff "for the past two years has repeatedly demanded" that the defend-

ants accept the bonds owned by plaintiff and hand to it, in lieu

thereof, beneficial certificates on the same basis as to other bond-

holders. From the aforesaid allegations it must be assumed that the

first demand made by plaintiff upon the Trustee to accept the bonds

and issue beneficial certificates therefor was made not earlier than

April 29, 1938, which was more than a year after the bonds were pur-

chased from O'Leary, and more than a year and four months after the

closing of the Trust.

Plaintiff contends: (1) "If Hogan and Brown, the majority

of the Trust Managers, have received dividends as stockholders of the

Realty Renting Agency, they must account to the Trust;" and (2) "Plaintiff was entitled to a hearing upon the questions raised by the complaint." We have considered plaintiff's very brief argument in support of these two contentions and find it without merit. If we are right in our ruling as to plaintiff's first two contentions, the last two contentions necessarily fail.

The judgment order of the Superior court of Cook county dismissing this cause for want of equity is affirmed.

JUDGMENT ORDER AFFIRMED.

Sullivan and Friend, JJ., concur.

Realty Renting Agency, they must account to the Trust; and (2) "Plaintiff was entitled to a hearing upon the questions raised by the complaint." We have considered plaintiff's very brief argument in support of these two contentions and find it without merit. If we are right in our ruling as to plaintiff's first two contentions, the last two contentions necessarily fail.

The judgment order of the superior court of Cook county dismissing this case for want of equity is affirmed.

JUDGMENT ORDER AFFIRMED.

Sullivan and Friend, JJ., concur.

41660

CROWN AUTOMOTIVE SALES & MFG. CO.,  
Appellee,

v.

LEE M. GOLDSTEIN, doing business as  
LEE M. GOLDSTEIN & COMPANY,  
Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

314 T.A. 566<sup>2</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action in contract to recover for goods and merchandise delivered by plaintiff to the Miles Equipment Manufacturing Company upon an alleged oral agreement by defendant to pay plaintiff for the merchandise delivered to said Company. There was a trial before the court without a jury and a finding for plaintiff for \$1,205.75. Defendant appeals from a judgment entered upon the finding.

Plaintiff's theory of fact is that it was doing business with the Miles Equipment Manufacturing Company and that on May 31, 1937, it felt insecure in its dealings with the said Company. Defendant had financed the operations of the Equipment Company by discounting its accounts receivable so that it might obtain money to pay for raw material, and in some cases defendant had loaned said Company money to pay for raw material. As security said Company gave defendant a chattel mortgage that covered all of its finished goods and goods in process of manufacture. Defendant also represented the said Company in selling its products, for which he received five per cent commission. Plaintiff's evidence was to the effect that about May 31, 1937, it entered into an oral agreement with defendant by the terms of which plaintiff sold goods, wares and merchandise to defendant and billed the defendant for the same, but that at the request and direction of defendant it shipped the goods to the Equipment Company. Defendant's theory of fact is that he never entered into the oral agreement alleged by plaintiff, but that even if he did enter into the said oral agreement he clearly and unequivocally revoked the agreement prior to the completion of

GROWN AUTOMOTIVE SALES & MFG. CO.,  
Appellee,

APPEAL FROM JUDGMENT

COURT OF CHICAGO.

LEE M. GOLDSTEIN, doing business as  
LEE M. GOLDSTEIN & COMPANY,  
Appellant.

MR. PRESIDING JUSTICE SCHEIDT DELIVERED THE OPINION OF THE COURT.

An action in contract to recover for goods and merchandise delivered by plaintiff to the Miles Equipment Manufacturing Company upon an alleged oral agreement by defendant to pay plaintiff for the merchandise delivered to said company. There was a trial before the court without a jury and a finding for plaintiff for \$1,202.75. Defendant appeals from a judgment entered upon the finding.

Plaintiff's theory of fact is that it was doing business with the Miles Equipment Manufacturing Company and that on May 31, 1937, it felt insecure in its dealings with the said company. Defendant had financed the operations of the equipment company by discounting its accounts receivable so that it might obtain money to pay for raw material, and in some cases defendant had loaned said company money to pay for raw material. As security said company gave defendant a chattel mortgage that covered all of its finished goods and goods in process of manufacture. Defendant also represented the said company as selling its products, for which he received five per cent commission. Plaintiff's evidence was to the effect that about May 31, 1937, it entered into an oral agreement with defendant by the terms of which plaintiff sold goods, wares and merchandise to defendant and billed the defendant for the same, but that at the request and direction of defendant it shipped the goods to the Equipment Company. Defendant's theory of fact is that he never entered into the oral agreement alleged by plaintiff, but that even if he did enter into the said oral agreement he clearly and unequivocally revoked the agreement prior to the completion of

performance by plaintiff.

The decision of the case by the trial court involved a finding upon two issues of fact, first, was there an oral agreement whereby the defendant Goldstein was to pay for the merchandise delivered to the Miles Equipment Manufacturing Company; and, second, was there a termination of the agreement. Each side offered evidence to sustain its theory of fact. Plaintiff contended that the testimony to support its theory of fact was credible and that the testimony in support of defendant's theory of fact was perjured. Defendant contends that the evidence he offered was credible and that the testimony offered by plaintiff was perjury. It is certain that either the claim or the defense to it is based upon perjured. The trial judge saw and heard the witnesses and had advantages which we do not possess in passing upon their credibility. He found that plaintiff's claim was a bona fide one and that defendant's defense was not an honest one. We would certainly not be justified in holding that the trial court's finding is manifestly contrary to the weight of the evidence. Moreover, there are certain mountain peaks in the testimony that point the way to the truth and that satisfy us that the trial court was justified in his finding.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

performance by plaintiff.

The decision of the case by the trial court involved a

finding upon two issues of fact, first, was there an oral agree-

ment whereby the defendant sold to plaintiff the merchandise

delivered to the Miles Equipment Leasing Company; and, second,

was there a termination of the agreement. Two sides of the evidence

to sustain its theory of fact. Plaintiff contended that the testi-

mony to support its theory of fact was credible and that the testi-

mony in support of defendant's theory of fact was perjured. Defen-

ant contends that the evidence he offered was credible and that the

testimony offered by plaintiff was perjured. It is certain that either

the claim or the defense to it is based upon perjury. The trial judge

saw and heard the witnesses and had advantages which we do not possess

in passing upon their credibility. He found that plaintiff's claim

was a bona fide one and that defendant's defense was not an honest

one. We would certainly not be justified in holding that the trial

court's finding is manifestly contrary to the weight of the evidence.

Moreover, there are certain non-bona fide peaks in the testimony that

point the way to the truth and that testify as that the trial court

was justified in his finding.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGE WILLIAM H. HARRIS.

Sullivan and Friend, 33, corner.



41784

ADDIE MOURANT,  
Appellant,

v.

THE PULLMAN TRUST & SAVINGS  
BANK, an Illinois corporation,  
and PULLMAN TRUST & SAVINGS  
BANK, an Illinois corporation,  
Appellees.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

314 I.A. 567

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover moneys paid by her under two written contracts in each of which she agreed to buy a lot in Cook county. Plaintiff filed a second amended complaint. Upon motion of defendants the suit was dismissed at plaintiff's costs "because said second amended complaint states no cause of action." Plaintiff appeals.

The second amended complaint consists of two counts. Count two is the same as count one save that it is based upon a contract between the same parties covering a different lot. Count one reads as follows:

"1. That on January 2, 1926, Addie Mourant entered into an Agreement to purchase Lot 27 in Calumet Parkview Subdivision, according to the plat thereof, in Cook County, Illinois, from The Pullman Trust and Savings Bank, an Illinois Corporation, as Trustee under Trust Agreement known as Trust No. 647, and pursuant thereto paid the sum of Five Hundred Twenty Nine Dollars and Sixty Five Cents as follows:- Three Hundred Seventy Five Dollars stated in said contract to have been paid at the signing and delivery thereof, One Hundred Thirty Eight Dollars on December 21, 1926, and Sixteen Dollars and Sixty Five Cents on September 7, 1927, in the form of principal, interest, taxes and special assessments, the exact amount being within the peculiar knowledge and possession of The Pullman Trust and Savings Bank and Pullman Trust and Savings Bank, Trustee and Successor Trustee, respectively, of Trust Agreement known as

ADDIE MOUNTANT, Appellant,

v.

THE PULMAN TRUST & SAVINGS BANK, an Illinois corporation, and PULMAN TRUST & SAVINGS BANK, an Illinois corporation, Appellees.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

MR. PRESIDING JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT. Plaintiff sued to recover moneys paid by her under two written contracts in each of which she agreed to buy a lot in Cook county. Plaintiff filed a second amended complaint. Upon motion of defendants the suit was dismissed at plaintiff's costs "because said second amended complaint states no cause of action." Plaintiff appeals.

The second amended complaint consists of two counts. Count two is the same as count one save that it is based upon a contract between the same parties covering a different lot. Count one reads as follows:

"1. That on January 2, 1926, Addie Mountant entered into an Agreement to purchase lot 27 in Calumet Parkview subdivision, according to the plat thereof in Cook County, Illinois, from The Pulman Trust and Savings Bank, an Illinois Corporation, as Trustee under Trust Agreement known as Trust No. 647, and pursuant thereto paid the sum of Five Hundred Twenty Nine Dollars and Sixty Five Cents as follows:-- Three Hundred Seventy Five Dollars stated in said contract to have been paid at the signing and delivery thereof, One Hundred Thirty Eight Dollars on December 21, 1926, and Sixteen Dollars and Sixty Five Cents on September 7, 1927, in the form of principal, interest, taxes and special assessments, the exact amount being within the peculiar knowledge and possession of The Pulman Trust and Savings Bank and Pulman Trust and Savings Bank, Trustee and Successor Trustee, respectively, of Trust Agreement known as

Trust No. 647.

"2. That the agreement as set out in paragraph 2 of Count I of plaintiff's First Amended Complaint at Law is a true photostatic copy of the aforementioned agreement.

"3. That Lot 27 at the date of the contract was and still is vacant property and at no time has been occupied or used by the plaintiff.

"4. That the following 'Notice' was received by Addie Mourant on June 10, 1938 by registered mail:-

"NOTICE.

"You are hereby notified that there is an unpaid balance of principal of \$1,019.97 which is long last due, payable and owing by you to the undersigned under and in accordance with the terms of a contract dated January 2, 1926, made between you and the undersigned, relative to the purchase by you of Lot 27 in Calumet Park View Sub-division, according to the plat thereof, together with interest to be computed as in said contract provided from July 2, 1926, and certain moneys advanced by the undersigned for general taxes and special assessments and interest on said advances.

"The undersigned hereby tenders to you a deed conveying said real estate, together with a guarantee of title, subject to the terms of said contract and on condition that you pay all of the above mentioned indebtedness to the undersigned within thirty days from the date hereof.

"You are hereby notified and warned that if you fail to pay said entire indebtedness within thirty days from the date hereof, the undersigned will show you no further indulgence, and that the undersigned insists on a strict compliance by you with the literal and strict terms of said contract, and if said entire indebtedness is not paid within thirty days from the date hereof, the undersigned intends to forfeit all your right, title and interest in and to said contract and in and to the real estate therein described.

Trust No. 647.

"2. That the agreement set out in paragraph 2 of Count I of Plaintiff's First Amended Complaint at Law is a true photographic copy of the aforementioned agreement.

"3. That Lot 27 at the date of the contract was and still is vacant property and at no time has been occupied or used by the Plaintiff.

"4. That the following 'Notice' was received by Addie

Mourant on June 10, 1938 by registered mail:-

"NOTICE"

"You are hereby notified that there is an unpaid balance of principal of \$1,019.97 which is long due, payable and owing by you to the undersigned under and in accordance with the terms of a contract dated January 2, 1926, made between you and the undersigned relative to the purchase by you of Lot 27 in Calumet Park View Sub-division, according to the plat thereof, together with interest to be computed as in said contract provided from July 2, 1926, and certain moneys advanced by the undersigned for general taxes and special assessments and interest on said advances.

"The undersigned hereby tenders to you a deed conveying said real estate, together with a guarantee of title, subject to the terms of said contract and on condition that you pay all of the above mentioned indebtedness to the undersigned within thirty days from the date hereof.

"You are hereby notified and warned that if you fail to pay said entire indebtedness within thirty days from the date hereof, the undersigned will show you no further indulgence, and that the undersigned insists on a strict compliance by you with the literal and strict terms of said contract, and if said entire indebtedness is not paid within thirty days from the date hereof, the undersigned intends to forfeit all your right, title and interest in and to said contract and in and to the real estate therein described.

"You are hereby advised that the undersigned is the Calumet Park View Trustee mentioned in said contract.

"Yours very truly,  
"The Pullman Trust & Savings Bank  
as Trustee under Trust Agreement  
known as Trust No. 647,  
"By Paul E. Pearson,  
"Vice President.

"5. That the following 'Declaration of Forfeiture' was received by Addie Mourant on July 16, 1938 by registered mail:

"DECLARATION OF FORFEITURE.

"Following up warning notice dated June 10, 1938, heretofore sent you, you are hereby notified that under the terms of a certain contract for the sale of the following described real estate, to-wit: Lot Twenty-seven in Calumet Park View Subdivision, according to the plat thereof, in Cook County, Illinois, which contract was dated January 2, 1926, and was made between The Pullman Trust and Savings Bank as Trustee under Trust Agreement known as Trust No. 647, as Seller, and Addie Mourant, as Purchaser, the undersigned agreed to convey, or cause to be conveyed, to you, by special warranty deed, the real estate hereinbefore described, subject to the matters and things in said contract set forth, provided, however, that the payments were made by you and the covenants, agreements and obligations performed on your part, as therein stated.

"Said contract further provided, among other things, that you were to pay the sum of One Thousand Five Hundred Dollars for said real estate as follows: Three Hundred Seventy-five Dollars at the signing and delivery of said contract and the balance of One Thousand One Hundred Twenty-five Dollars in quarterly installments of Sixty-nine Dollars or more, including interest on all sums at any time unpaid at the rate of six per cent. per annum till due, and thereafter at the rate of seven per cent. per annum till paid, payable monthly until said principal sum is fully paid.

"Said contract further provided, among other things, that

"You are hereby advised that the undersigned is the

Calumet Park View Trustee mentioned in said contract.

"Yours very truly,  
"The Pullman Trust & Savings Bank  
as Trustee under Trust Agreement  
known as Trust No. 647,  
By Paul S. Pearson,  
Vice President."

"That the following 'Declaration of Foreclosure' was re-

ceived by Addie Mount on July 10, 1933 by registered mail:

"DECLARATION OF FORECLOSURE."

"Following up warning notice dated June 10, 1933, heretofore

sent you, you are hereby notified that under the terms of a certain contract for the sale of the following described real estate, to-wit:

Lot Twenty-seven in Calumet Park View Subdivision, according to the

plat thereof, in Cook County, Illinois, which contract was dated

January 2, 1926, and was made between The Pullman Trust and Savings

Bank as Trustee under Trust Agreement known as Trust No. 647, as

Seller, and Addie Mount, as Purchaser, the undersigned agreed to

convey, or cause to be conveyed, to you, by special warranty deed,

the real estate heretofore described, subject to the matters and

things in said contract set forth, provided, however, that the pay-

ments were made by you and the covenants, agreements and obligations

performed on your part, as therein stated.

"Said contract further provided, among other things, that you

were to pay the sum of One Thousand Five Hundred Dollars for said

real estate as follows: Three Hundred Twenty-five Dollars at the

signing and delivery of said contract and the balance of One

Thousand One Hundred Twenty-five Dollars in quarterly installments

of Sixty-nine Dollars or more, including interest on all sums at

any time unpaid at the rate of six per cent. per annum till due,

and thereafter at the rate of seven per cent. per annum till paid,

payable monthly until said principal sum is fully paid.

"Said contract further provided, among other things, that

you were to pay all regular taxes after the date thereof upon said lands, and to pay all special assessments levied at any time thereon.

"The undersigned, which is the Calumet Park View Trustee mentioned in said contract, DOES HEREBY FURTHER NOTIFY YOU that because of your failure to pay the balance of principal aggregating One Thousand Nineteen Dollars and Ninety-seven Cents in quarterly installments as provided in said contract, and because of your failure to pay interest thereon as provided in said contract, and because of your failure to pay certain regular taxes and certain installments of special assessments levied and assessed against said real estate as provided in said contract, the undersigned has elected to forfeit and determine said contract, and does hereby forfeit and determine said contract in accordance with the terms thereof, and does hereby forfeit and determine all your right, title and interest in and to said contract and in and to the real estate therein described.

"YOU ARE HEREBY FURTHER NOTIFIED that unless you permit the undersigned to take possession of said premises without further notice and without proceedings at law or in equity, as agreed by you in said contract, that a proceeding under the provisions of a Statute of the State of Illinois, entitled 'An Act in regard to Forcible Entry and Detainer', commonly known as Chapter 57 of Illinois Revised Statutes, 1937, State Bar Association Edition,

you were to pay all regular taxes after the date thereof upon said lands, and to pay all special assessments levied as and by time thereon.

"The undersigned, which is the Calumet Park View

Trustee mentioned in said contract, DOES HEREBY FURTHER NOTIFY YOU that because of your failure to pay the balance of principal aggregating One Thousand Nineteen Dollars and Ninety-seven Cents in quarterly installments as provided in said contract, and because of your failure to pay interest thereon as provided in said contract, and because of your failure to pay certain regular taxes and certain installments of special assessments levied and assessed against said real estate as provided in said contract, the undersigned has elected to forfeit and determine said contract, and does hereby forfeit and determine said contract in accordance with the terms thereof, and does hereby forfeit and determine all your right, title and interest in and to said contract and in and to the real estate therein described.

"YOU ARE HEREBY NOTIFIED that unless you permit the undersigned to take possession of said premises without further notice and without proceedings at law or in equity, as agreed by you in said contract, that a proceeding under the provisions of a statute of the State of Illinois, entitled 'An act in regard to Forfeiture, Entry and Detainer', commonly known as Chapter 57 of Illinois Revised Statutes, 1937, State Bar Association Edition,



will be instituted against you by the undersigned for the possession of the following described real estate and property, to-wit:

"Lot Twenty-seven in Calumet Park View Subdivision, according to the plat thereof, in Cook County, Illinois,

"The Pullman Trust and Savings Bank  
as Trustee under Trust Agreement  
known as Trust No. 647.  
"By Paul E. Pearson,  
"Vice President.

"6. That pursuant to a demand made on August 2, 1938 on The Pullman Trust & Savings Bank by said Addie Mourant for return of the money paid by her under the contract 'whether made in payment of principal, interest, taxes or special assessments, plus interest from the date of payment thereof', The Pullman Trust and Savings Bank, by its attorney and duly authorized agent, Wellington G. Brown, did refuse to return the same on the ground that 'under the forfeiture and other provisions of said contracts and the law applicable thereto' she was not entitled to the return of any money, and at all times since has refused to return the same.

"7. That on September 30, 1938, The Pullman Trust and Savings Bank, as Trustee under Trust Agreement known as Trust No. 647, conveyed the premises the subject matter of the above contract, to Edward P. Gannon; that on September 30, 1938 the said Edward P. Gannon conveyed the said premises to Pullman Trust and Savings Bank, as Trustee under Trust Agreement known as Trust No. 2805.

"8. That Trust Agreement No. 647 dated June 22, 1925 provided that said Trust Agreement should not be recorded; that no purchaser of real estate from the Trustee should 'be privileged to inquire into the terms of this trust'; that the interest of the beneficiaries 'and all parties claiming under by or through them are hereby declared and considered to be personal property'; that 'this trust, unless previously closed by the sale of all the real estate herein described, shall be closed in five years from the date hereof, and the Trustee shall convey any lots, the title to

-2-

will be instituted against you by the undersigned for the possession of the following described real estate and property, to-wit: "Lot Twenty-seven in Calumet Park View Subdivision, according to the plat thereof, in Cook County, Illinois.

"The Pullman Trust and Savings Bank as Trustee under Trust Agreement known as Trust No. 647, By Paul H. Pearson, Vice President.

"6. That pursuant to a demand made on August 2, 1938 on The Pullman Trust & Savings Bank by said Addie Mowbrant for return of the money paid by her under the contract, whether made in payment of principal, interest, taxes or special assessments, plus interest from the date of payment thereof, The Pullman Trust and Savings Bank, by its attorney and duly authorized agent, Wellington G. Brown, did refuse to return the same on the ground that 'under the forfeiture and other provisions of said contracts and the law applicable thereto' she was not entitled to the return of any money, and at all times since has refused to return the same.

"7. That on September 30, 1938, The Pullman Trust and Savings Bank, as Trustee under Trust Agreement known as Trust No. 647, conveyed the premises the subject matter of the above contract to Edward P. Gannon; that on September 30, 1938 the said Edward P. Gannon conveyed the said premises to Pullman Trust and Savings Bank, as Trustee under Trust Agreement known as Trust No. 2807.

"8. That Trust Agreement No. 647, dated June 22, 1927 provided that said Trust Agreement should not be recorded; that no purchaser of real estate from the Trustee should be privileged to inquire into the terms of this trust; that the interest of the beneficiaries and all parties claiming under by or through them are hereby declared and considered to be personal property; that this trust, unless previously closed by the sale of all the real estate herein described, shall be closed in five years from the date hereof, and the Trustee shall convey any lots, the title to

which it then holds, to the parties of the first part, their legal representatives or assigns, and make distribution of any money or other personal property then on hand, in trust, in the same manner as hereinbefore provided'

"9. That the contract is unenforceable because said contract is materially defective for lack of mutuality, because there is neither an individual or partnership, nor a corporation, against whom the purchaser could proceed to compel a conveyance, the purchaser being obligated to pay, but no one being obligated to convey, and therefore the plaintiff is entitled to the return of money paid plus interest from date of payment.

"10. \* \* \*

"11. That upon information and belief Pullman Trust & Savings Bank is successor, both individually and as Trustee, to The Pullman Trust & Savings Bank, and as such has possession and control of the assets of said bank.

"12. That there remains due and owing said Addie Mourant, from The Pullman Trust and Savings Bank and Pullman Trust & Savings Bank Five Hundred Twenty-Nine Dollars and Sixty Five Cents, or some other sum within the peculiar knowledge and possession of said defendants plus interest from the date of payment.

"Wherefore, the plaintiff, Addie Mourant, demands judgment against The Pullman Trust and Savings Bank an Illinois Corporation and Pullman Trust & Savings Bank, an Illinois corporation in the sum of Five Hundred Twenty Nine Dollars and Sixty Five Cents, or whatever other amount is found to be due and owing, plus interest from date of payment."

We have omitted paragraph 10 of the count for the reason that the trial court, upon motion of defendants, struck that paragraph for defects in substance.

From the well pleaded allegations of the second amended

which is then held, to the extent of the legal representatives or assigns, and to the extent of any money or other personal property then on hand, in the same manner as heretofore provided;

"9. That the contract is unenforceable, because said contract is materially defective for lack of legality, and also that it is neither an individual or partnership, nor a corporation, against whom the purchaser could proceed to compel a conveyance, the purchaser being obligated to pay, but no one being obligated to convey, and therefore the plaintiff is entitled to the return of money with plus interest from date of payment.

"10. \* \* \*

"11. That upon information and belief Plaintiff Trust & Savings Bank is successor, both individually and as trustee, to The Pullman Trust & Savings Bank, and as such has possession and control of the assets of said bank.

"12. That there remains due and owing said debt account from The Pullman Trust and Savings Bank and Pullman Trust & Savings Bank Five Hundred Twenty-Nine Dollars and Sixty Five Cents, or some other sum within the peculiar knowledge and possession of said defendants plus interest from the date of payment.

"Wherefore, the plaintiff, Abbie Howard, demands judgment against The Pullman Trust and Savings Bank an Illinois corporation and Pullman Trust & Savings Bank, an Illinois corporation in the sum of Five Hundred Twenty Nine Dollars and Sixty Five Cents, or whatever other amount is found to be due and owing, plus interest from date of payment."

We have omitted paragraph 10 of the count for the reason that the trial court, upon motion of defendants, struck this paragraph for defects in substance. From the well pleaded allegations of the second amended

complaint it must be assumed that defendant, the vendor, was never in default, and was always willing, ready and able to perform; that plaintiff, the vendee, defaulted in payment of principal, interest and taxes for over ten years, and that because of such defaults defendant forfeited the contracts; that prior to the forfeiture defendant served plaintiff with a notice that if plaintiff did not pay the entire indebtedness within thirty days from the date of the notice, no further indulgence would be shown her and that forfeiture would follow; that plaintiff was thus given an opportunity to perform and to avoid a forfeiture, and that the declaration of forfeiture was not served upon plaintiff until thirty-six days after the warning letter of June 10, 1938; that plaintiff did nothing until over two weeks after the contracts had been forfeited, when she demanded the return of moneys that she had paid more than ten years before on account of the purchase price.

In our judgment, the principal contention urged by plaintiff is that the vendor was not granted the power to terminate the contract by its terms and that therefore there could be "no forfeiture of money paid. \* \* \* that forfeiture is a special right conferred by contract upon a vendor;" that defendant had the right under the written instrument to terminate the contract on default by the vendee; that defendant exercised that power but that it now has in its possession and control money which in equity and good conscience belongs to plaintiff, which she is entitled to receive. Defendant contends that "where the vendor forfeits a contract because of the default of the vendee in making payments, the vendee cannot recover back what he has paid, and this is the rule notwithstanding the contract does not provide that the vendor may retain the money paid in case of a forfeiture of the contract;" that "it is not necessary for the contract to contain any express provision for forfeiture or for termination of the contract in the event of the vendee's default. Such clauses in

-7-

complaint it must be shown that defendant, in fact, was in default, and was at all times, ready, willing and able to perform the contract. The vendor, plaintiff, the vendor, is entitled to the benefit of the contract, and takes for over ten years, and that defendant, defendant forfeited the contract; that defendant is in default of the contract, and served plaintiff with a notice that is sufficient to put the entire indebtedness within thirty days from the date of the notice, no further indulgence would be shown her and that defendant would follow; that plaintiff was thus given an opportunity to perform and to avoid a forfeiture, and that the decision of the court was not served upon plaintiff until thirty days after the warning letter of June 10, 1938; that plaintiff did not perform until over two weeks after the contract had been forfeited, when she demanded the return of money that she had paid more than ten years before on account of the purchase price.

In our judgment, the principal contention urged by plaintiff is that the vendor was not granted the power to terminate the contract by its terms and that therefore there could be no forfeiture of money paid. \* \* \* that forfeiture is a special right conferred by contract upon a vendor; that defendant had the right under the written instrument to terminate the contract on default by the vendor; that defendant exercised that power but that it now has in its possession and control money which in equity and good conscience belongs to plaintiff, which she is entitled to receive. Defendant contends that "where the vendor forfeits a contract because of the default of the vendee in making payments, the vendee cannot recover back what he has paid, and this is the rule notwithstanding the contract does not provide that the vendor may retain the money paid in case of a forfeiture of the contract;" that "it is not necessary for the contract to contain any express provision for forfeiture or for termination of the contract in the event of the vendee's default, such clauses in

a contract are but declarations of what would have been the legal rights of the vendor without such provisions." In support of plaintiff's contention the following cases are cited: Murphy v. Lockwood, 21 Ill. 611; Wheeler v. Mather, 56 Ill. 241; Staley v. Murphy, 47 Ill. 241, and Seiders v. Henry, 347 Ill. 467. There is force in the contention of defendants that counsel for plaintiff, in his argument, assumes that there was a rescission by defendant, notwithstanding the fact that the complaint sets up a forfeiture by defendant. A rescission is a termination of a contract with restitution. Where a forfeiture is properly exercised it terminates a contract without restitution. The facts in Murphy v. Lockwood are entirely different from the facts in the instant case. There the Supreme court held that the vendor could not rescind the contract without himself complying with the stipulations contained therein, and that the vendor's ground for rescinding failed. In Wheeler v. Mather the court treated the case of Murphy v. Lockwood as one in which the vendor sought to rescind the contract. Staley v. Murphy was an ejectment suit, and the court held, following Murphy v. Lockwood, that "the ordinary rule is, that a party rescinding a contract must place the other party in statu quo." Wheeler v. Mather, a later case than the last two mentioned, not only does not sustain plaintiff's position but sustains defendants' position. Defendants cite Wheeler v. Mather, *supra*; McLeod v. Sharp, 53 Ill. App. 406; Harlow v. Snow, 147 Ill. App. 369; Rea v. Security Trust & Savings Bank, (Cal. App.) 19 Pac. (2d) 267; Mintle v. Sylvester, 202 Iowa 1128, 1131-1134; Glock v. Howard & Wilson Colony Co., 43 L. R. A. 199, 204, and Utter v. Stuart, 30 Barbour (N. Y.) 20, 22. Wheeler v. Mather, the leading Illinois case upon the question before us, was before the court upon a rehearing and the opinion states (p. 244) that "it has received an extended and careful reconsideration." It involved an action of assumpsit, upon the common counts, brought by the purchaser of real estate to recover back money which he had

a contract and the obligations of the parties thereunder. The rights of the vendor without such provisions, as stated in the plaintiff's contention the following cases are cited: Lockwood, 21 Ill. 611; Wheeler v. Wheeler, 50 Ill. 244; Wheeler v. Wheeler, 47 Ill. 241, and Wheeler v. Wheeler, 47 Ill. 241. There is force in the contention of defendants that such provisions, in his argument, cannot exist where there was a consideration for the contract, notwithstanding the fact that the plaintiff's contention is that the defendant. A rescission is a termination of a contract of sale. Restitution, where a contract is properly rescinded, is not a contract without restitution. The fact is, however, that the contract is entirely different from the facts in the instant case. Then the Supreme court held that the vendor could not rescind the contract without himself complying with the actual terms contained therein, and that the vendor's ground for rescinding failed. In Wheeler v. Wheeler, the court created the case of Wheeler v. Wheeler, 50 Ill. 244, which the vendor sought to rescind the contract, Wheeler v. Wheeler, 50 Ill. 244, and the court said, 1 Ill. 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.



paid the vendor. The opinion states (pp. 245-249): "The appellee, plaintiff below, was the only witness on his behalf. He introduced in evidence articles of agreement under seal, bearing date April 1, 1861, whereby appellant, as party of the first part, in consideration of the prompt payment of the money to be paid by appellee, agreed to sell appellee lands therein described, subject to a mortgage, appellee covenanting to pay for them \$1,892 as follows: \$550 cash at the time of making the contract, \$550 on the 1st day of June, A. D. 1861, and the balance, \$792, on the 1st day of April, 1862. Time was made of the essence of the contract. Appellant covenanted that, on the payment of the principal and interest as specified, he would, without delay, convey all his right, title and interest in the premises by deed with full covenants of warranty. The articles contained the proviso that they were upon the express condition that, in case of failure of the party of the second part (appellee) in the performance of all or either of the covenants on his part to be performed, the party of the first part (appellant) should have the right to declare the contract void, and take immediate possession of the premises.

"Appellee then produced in evidence a notice signed by appellant, dated August 2, 1862, and served on him about that time, which, after describing the contract, and reciting appellee's failure in making his payments, notified him that appellant declared the contract void and terminated.

"From his own testimony, it appears that appellee had paid only part of the installment of \$550 due June 1, A. D. 1861, and no part of that of \$792, due April 1, 1862. Nor did he offer any excuse for such default, or claim that there was any fraud or default on the part of appellant, but says he never demanded any deed from him. \* \* \*

"\* \* \* There is no theory upon which this action can be sustained, if at all, except that of an implied promise.

"If appellant had violated the contract, or it had been

paid the vendor. The opinion also states that the only witness on the part of the plaintiff below, was the only witness on the part of the plaintiff below, in evidence articles of agreement under which, the plaintiff below, in 1861, whereby appellant, as party of the first part, in consideration of the prompt payment of the money to be paid by appellant, agreed to sell appellee lands therein described, a part to be a mortgage, and the balance, to pay for them \$1,000 as follows: \$500 on the 1st day of June, 1861, and the balance, \$500, on the 1st day of April, 1862. Appellant, in the essence of the contract, conveyed all his right, title and interest in and to the lands, together with full covenants of warranty. The parties contained the proviso that they were upon the express condition that, in case of failure of the party of the second part (appellee) in the performance of all or either of the covenants on his part to be performed, the party of the first part (appellant) should have the right to rescind the contract void, and take the whole of the money paid by him.

"Appellee then produced in evidence a note signed by appellant, dated August 2, 1861, and given on the 1st day of August, 1861, which, after describing the contract, and reciting appellant's failure in making his payments, notified him that appellant's interest in the contract was void and terminated.

"From his own testimony, it appears that appellee had paid only part of the installment of \$500 due June 1, 1861, and no part of that of \$500, due April 1, 1862, for which he offered no excuse for such default, or claim that there was any fraud or mistake on the part of appellant, but says he never demanded any more from him.

"\* \* \* There is no theory upon which this claim can be maintained, if at all, except that of an implied promise. "If appellant had violated the contract, or if he had

rescinded by mutual consent, then the law would imply a promise on his part to pay back the consideration received. Paxon v. Mansfield, 2 Mass. 147; Seymour v. Bennet, 14 id. 266.

"But this contract was not rescinded by mutual consent. Appellee violated it, and then, as a consequence, appellant declared it terminated; and it was no breach of the contract on his part to do so. In Battle v. The Rochester City Bank, 3 Const. 88, where the contract contained a similar provision and the right was exercised, the court said: 'The rescission of the contract in question by the bank was not a breach of it, but was in pursuance of a provision contained in it; and the defendants are chargeable with no violation of it whatever.'

"We believe it to be a sound principle, supported alike by reason, authority and good morals, that no man can make his own infraction of his agreement the basis of an implied undertaking in his favor, or of an action for money had and received against the other party who stands fair and innocent. It was upon this principle that the right of recovery was denied in the case of Ketchum v. Evertson, 13 Johns. 359, cited in the original opinion in this case. 'It would,' said the court, 'be an alarming doctrine, to hold that the plaintiffs might violate the contract, and because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has advanced money upon it, would have the <sup>same</sup> right to recover it back that the plaintiffs have.'

"In Green v. Green, 9 Cow. 47, Chief Justice Savage reviewed all the former cases in New York on the subject, and closes his review by saying: 'I forbear the citation of more cases. I have found none of a recovery, where the party wishing to consider the contract rescinded has not shown a breach of the contract on the other side, or what was equal to it.'

rescinded by mutual consent, then the law would imply a promise on his part to pay back the consideration received. Norton v. Wanders, 2 Mass. 147; Payson v. Bennett, 14 id. 306.

"But this contract was not rescinded by mutual consent. Appellee violated it, and then, as a consequence, appellant declared it terminated; and it was no breach of the contract on his part to do so. In Battle v. The Rochester City Bank, 3 Comst. 38, where the contract contained a similar provision and the right was exercised, the court said: 'The rescission of the contract in question by the bank was not a breach of it, but was in pursuance of a provision contained in it; and the defendants are bound with no violation of it whatever.'

"We believe it to be a sound principle, supported alike by reason, authority and good morals, that no man can make his own infraction of his agreement the basis of an implied undertaking in his favor, or of an action for money had and received against the other party who stands fair and innocent. It was upon this principle that the right of recovery was denied in the case of Johnson v. Everton, 13 Johns. 389, cited in the original opinion in this case.

'It would,' said the court, 'be an alarming doctrine, to hold that the plaintiff might violate the contract, and because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received. Very men who make a bad bargain, and has advanced money upon it, would have the right to recover it back that the plaintiff have.'

"In Green v. Green, 9 Cow. 47, Chief Justice Savage reviewed all the former cases in New York on the subject, and closes his review by saying: 'I forbear the citation of more cases. I have found none of a recovery, where the party wishing to consider the contract rescinded has not shown a breach of the contract on the other side, or what was equal to it.'

"The case of Battle v. The Rochester City Bank, 5 Barb. 414, involved the precise question in the case at bar. The contract contained the proviso that the vendors might declare it void for default of the vendee in making his payments. Default was made, the right was exercised, and the vendee sued to recover back what he had paid. Wells, Justice, who delivered the opinion of the court (and it was afterward affirmed by the court of appeals, 3 Comst., supra), said, 'in the case at bar it is not pretended that the defendants have not fulfilled to the letter every part of the agreement on their part to be fulfilled, and the plaintiff, by his counsel in his opening, admits that he neglected to pay the first of the annual installments mentioned in the contract. I confess myself entirely unable to find, in any elementary treatise or reported case, a principle recognized, which would allow the plaintiff to recover.'

"Stark v. Parker, 2 Pick. 267, is a case where the plaintiff had agreed to work for the defendant a year for \$120; worked part of the time, then quit without any fault on the part of defendant, and sued upon a quantum meruit for what he had done. Lincoln, Justice, in delivering the opinion of the court, uses this language: 'Nothing can be more unreasonable than that a man who deliberately and wantonly violates an engagement, should be permitted to seek in a court of justice an indemnity from the consequences of his voluntary act, and we are satisfied that the law will not allow it.'

"Rounds v. Baxter, 4 Greenlf. 454, is very similar in its facts to the case of Ketchum v. Evertson, supra, and the court there said: 'The failure in the article of performance, then, was owing to the plaintiff's own fault, negligence or inattention, and we are to decide whether the law, in such circumstances, will furnish him an indemnity against the consequences of this fault, negligence or inattention. It is a proverbial principle that a man is not permitted, in a court of justice, to take advantage of his own

"The case of Little v. The Associated Builders & Trades Union of America, 100 U.S. 421, 425, involved the precise question in the case at bar. The contract contained the proviso that the vendors might look to the plaintiff for default of the vendors in making his payments. Certainly the vendors had the right was exercised, and the vendors sued to recover back what he had paid. Justice, who delivered the opinion of the court, said it was affirmatively held by the court in Little, 100 U.S. 421, 425, (and it was said at bar it is not pretended that this error), said, 'in the case at bar it is not pretended that the defendants have not fulfilled to the latter every part of the contract on their part to be fulfilled, and the plaintiff, by his contract, in his opening, admits that he neglected to pay the first of the annual installments mentioned in the contract. I confess myself entirely unable to find, in any elementary principle of reported case, a principle recognized, which would allow the plaintiff to recover.'

"Stark v. Parker, 2 Pick. 207, is a case where the plaintiff had agreed to work for the defendant a year for \$100; worked part of the time, then quit without any fault on the part of defendant, and sued upon a quantum meruit for what he had done. Justice, in delivering the opinion of the court, says in his language: 'Nothing can be more unreasonable than that a man who deliberately and wantonly violates an engagement, should be permitted to seek in a court of justice an indemnity from the consequences of his voluntary act, and we are satisfied that the law will not allow it.'

"Thomson v. Baxter, 4 Greenl. 454, is very similar in its facts to the case of Nichols v. Everett, 100 U.S. 421, 425, and the court there said: 'The failure in the article of performance, then, was owing to the plaintiff's own fault, negligence or inattention, and we are to decide whether the law, in such circumstances, will furnish him an indemnity against the consequences of this fault, negligence or inattention. It is a proverbial principle that a man is not permitted, in a court of justice, to take advantage of his own

wrong or neglect. The principle is founded in the highest reason. The defendant never made an express promise to repay the money in question, and why should the law imply one in favor of a man who has violated his contract on the part of one who stands fair and innocent? If a man gives his neighbor \$100 he can not by law recover it back; no promise of re-payment is implied, and when the plaintiff concluded not to perform his contract, but abandon it, we must consider him as waiving all claim to what he had paid, as much as if he had given it without any pretense of consideration received.'

"In the case of Hansbrough v. Peck, in the supreme court of the United States, the contract contained a similar power, and also a clause authorizing the vendor to retain such purchase money as had been paid. The court, however, does not place the decision upon that ground; because, that being a case in chancery, such a clause, if it operated as mere forfeiture, would receive but little countenance from a court of equity. But recognizing the rule as laid down in Ketchum v. Evertson, supra, the court said, 'and no rule in respect to the contract is better settled than this: That the party who has advanced money or done an act in part performance of the agreement and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has been advanced or done.' 5 Wall."

The court concludes (pp. 250, 251): "There is no question as to the general principle that where the parties have not themselves prescribed the right of rescission and the circumstances under which it may be exercised, restoration must be made. All of the other cases cited by appellee's counsel are of this latter class. And none of them tend to support the position that a vendee shall be permitted in a court of justice to obtain indemnity against the consequences of his own mere default.

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"From the authorities above cited, and others of like weight and respectability, we may deduce these rules: Where the vendee enters upon the performance of such a contract, and, paying part of the purchase money, makes default which is inexcusable, and the vendor, being without fault, exercises the right given by the contract of declaring the same terminated, and in so doing acts fairly and within the scope of the power, then no action can be maintained by the vendee to recover back what he has paid. But a vendor, who is himself in fault, for fraud or violation of his contract, can not exercise the power so given without making restoration of what he has received under it. In such case the law would imply a promise to repay the purchase money received, and the equitable action for money had and received lie to recover it.

"We do not, however, hold, or mean to be understood as holding, that these rules cover the entire subject matter. There may be cases where a vendee, chargeable with a technical default under such a contract, might, under particular circumstances, be entitled to other relief, as in a case where he had paid a large portion of the purchase money, made valuable improvements upon the property, and his default was the result of fraud, accident or mistake; or the vendor should attempt to exercise the power of forfeiture in a case not fairly within its scope; or unfairly and oppressively, with the view of taking an undue advantage of the vendee by a forfeiture of payments and improvements; and in all other cases falling within the principles by which courts of equity are governed, the vendee may resort to such court to restrain the act of the vendor, if about to be done, or, if accomplished, to set it aside, and to have the equities of the parties arising from their relations adjusted according to the circumstances of each case.

"The case at bar presents no grounds for the action for money had and received, or relief in equity, within any of the

"From the authorities above cited, and others of like weight and respectability, we may deduce these rules: Where the vendee enters upon the performance of such a contract, and, paying part of the purchase money, makes default which is irreparable, and the vendor, being without fault, exercises the right given by the contract of declaring the same terminated, and in so doing acts fairly and within the scope of the power, then no action can be maintained by the vendee to recover back what he has paid. But a vendor, who is himself in fault, for fraud or violation of his contract, can not exercise the power so given without making restoration of what he has received under it. In such case the law would imply a promise to repay the purchase money received, and the equitable action for money had and received lies to recover it.

"We do not, however, hold, or mean to be understood as holding, that these rules cover the entire subject matter. There may be cases where a vendee, chargeable with a technical default under such a contract, might, under particular circumstances, be entitled to other relief, as in a case where he had paid a large portion of the purchase money, made valuable improvements upon the property, and his default was the result of fraud, accident or mistake; or the vendor should attempt to exercise the power of forfeiture in a case not fairly within its scope; or unfairly and oppressively, with the view of taking an undue advantage of the vendee by a forfeiture of payments and improvements; and in all other cases falling within the principles by which courts of equity are governed, the vendee may resort to such court to restrain the act of the vendor, if about to be done, or, if accomplished, to set it aside, and to have the equities of the parties arising from their relations adjusted according to the circumstances of each case.

"The case at bar presents no grounds for the action for money had and received, or relief in equity, within any of the

above rules. The judgment of the court below must therefore be reversed and the cause remanded."

Wheeler v. Mather has not been, to our knowledge, overruled or modified, and it has been cited with approval in a number of cases.

Plaintiff also cites Seiders v. Henry, supra. That case was before this court (259 Ill. App. 427, 429), and it appears from the opinion of this court that the trial court held (p. 429): "that where a party has advanced money, or done any other act in part performance of any agreement, and then refuses to proceed to carry out the other terms of the agreement, the other party being ready and willing to fulfill all the obligations imposed upon him by such agreement, he cannot recover back the money thus advanced, nor recover damages for any acts done by him in pursuance of said agreement." This court, speaking through Mr. Presiding Justice Matchett, decided that the trial court held correctly, and cited Wheeler v. Mather, supra; Bryson v. Crawford, 68 Ill. 362; Harlow v. Snow, 147 Ill. App. 369, and Hansbrough v. Peck, 5 Wall. 497, as a few of the cases which supported their decision. The judgment in favor of defendant entered by this court was reversed by the Supreme court, but upon the ground (347 Ill. 467, 472) that "the contract by its indefinite terms required further agreements between the parties before it became of binding force upon either, and their subsequent efforts in this direction failed."

In Harlow v. Snow, supra, the court said (p. 376): "It has been decided in Illinois that installments of purchase money paid on contracts of purchase cannot be recovered back on a forfeiture of the contract by its terms through the fault of the vendee, even where the contract does not specifically provide that they may be retained; a fortiori they cannot when it does so provide. Wheeler v. Mather, 56 Ill. 241; Whitaker v. Robinson, 65 Ill. 411; Bryson v. Crawford, 68 Ill. 366."



In Rea v. Security Trust & Savings Bank, supra, the court said (p. 269): "But the right of the seller to retain the amount of payments which had been made is independent of any express clause in the contract for the forfeiture of rights or the retention of payments as liquidated damages; such clauses being but declarations of what would have been the legal rights of the vendor without such provisions."

In Glock v. Howard & Wilson Colony Co., supra, the court said (p. 204): "When an equitable showing is not made to excuse the breach, the vendor has the right in equity, as he always has at law, to retain the moneys paid by the vendee. Therefore we have said that it matters not in such contracts that the parties have declared that the vendor may retain the moneys paid as stipulated damages. The name which the parties thus give does not alter the fact nor change the vendor's rights. If it be said that the clause for stipulated damages is void, still the vendor is entitled to retain the money. Thus, in Hansbrough v. Peck, 5 Wall. 497, 18 L. ed. 520, the Supreme Court of the United States, having under consideration this identical question, says: 'No rule in respect to the contract is better settled than this: that the party who has advanced money or done an act in part performance of the agreement and then stops short, and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done.' In precise illustration of the proposition may be quoted the language of the learned Chancellor Walworth in Edgerton v. Peckham, 11 Paige, 352: 'The contract, it is true, contains a general provision that, if default shall be made in either of the payments, Strobeck shall forfeit all the previous payments, and give up the possession of the premises. This, however, is but the legal effect of the contract without such a provision; for,

In Rees v. Security Trust & Savings Bank, 1924, 100 F.2d 100, 101.

said (p. 209): "But the right of the seller to retain the amount of payments which had been made is independent of any express clause in the contract for the forfeiture of rights or the retention of payments as liquidated damages; such clause being but declaratory of what would have been the legal rights of the vendor without such provisions."

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if no such provision had been contained in the agreement, the defendant might have brought an action of ejectment to recover the possession of the premises, which ejectment suit this court would not have restrained, except upon the terms of paying the balance of the purchase money and the costs of suit. Nor could the payments already made pursuant to the terms of the contract have been recovered back if the vendee had refused to complete his purchase, even if this clause of forfeiture had not been inserted in the contract. \*\*\* \*!"

In Mintle v. Sylvester, supra, the court said (p. 1132):

"An express stipulation for forfeiture of payments on default of the vendee is not a prerequisite to the right of the vendor on a default to retain the money paid and reinvest himself with possession of the land. Downey v. Riggs, 102 Iowa 88; Mail & Times Publishing Co. v. Marks, 125 Iowa 622; Richards v. Hellen & Son, 153 Iowa 66, 74; Mohler v. Guest Piano Co., 186 Iowa 161; Hansbrough v. Peck, 5 Wall. (U. S.) 497; Glock v. Howard & Wilson Colony Co., 125 Cal. 1 (55 Pac. 713, 43 L. R. A. 199, 69 Am. St. 17); Edgerton v. Peckham, 11 Paige's Ch. (N. Y.) 352; Francis v. Shrader, 38 Cal. App. 592 (177 Pac. 168); Oursler v. Thacher, 152 Cal. 739 (93 Pac. 1007). See, also, Harrington v. Eggen, 51 N. D. 87 (199 N. W. 447); Matteson v. United States & C. Land Co., 103 Minn. 407 (115 N. W. 195); Engel v. Mahlen, 153 Minn. 1 (189 N. W. 422)."

See, also, Utter v. Stuart, supra, p. 22.

We conclude that the instant contention of plaintiff cannot be sustained and that the contentions of defendants are supported by the facts set up in the pleadings and the law. In this connection it will be noted that defendants did not seek to take an undue advantage of plaintiff by the forfeiture and that the complaint does not make out a case that would have entitled plaintiff to relief even in an equitable proceeding. She is in the position of a vendee who violates her contract and seeks to make that

It is no such provision has been contained in the contract, the defendant might have brought an action of ejectment or recovery of possession of the premises, which judgment and this court would not have reversed, except upon the terms of paying the balance of the purchase money and the costs of suit. Now, would the payments already made pursuant to the terms of the contract be recovered back if the vendor had refused to comply with the demand, even if this clause of forfeiture had not been inserted in the contract. \*\*\* \*"

In Wright v. Sylvester, supra, the court said (41, 1132):

"An express stipulation for forfeiture of payments on the

fault of the vendee is not a prerequisite to the right of the vendor

on a default to retain the money paid and refuse to deliver up

possession of the land. Dowry v. Higgs, 100 Iowa 38; Wright v. Higgs

Publication Co. v. Werka, 125 Iowa 622; Richards v. Kelley & Son,

123 Iowa 66, 74; Mohr v. Great Plains Co., 130 Iowa 131; Wasson v.

Peck, 5 Wall. (U. S.) 497; Glock v. Howard & Wilson Colony Co.

125 Cal. 1 (25 Pac. 713, 43 L. R. A. 199, 60 Am. St. 177); Idem

v. Peckham, 11 Paige's Ch. (N. Y.) 322; Franklin v. Franklin, 33 Cal.

App. 252 (17 Pac. 166); Ortner v. Wheeler, 120 Cal. 159 (23 Pac.

1007). See, also, Harrington v. Hagan, 21 N. H. 67 (29 N. H. 447);

Matteson v. United States & C. Land Co., 103 Minn. 407 (125 N. W.

127); Harrel v. Mahan, 123 Minn. 1 (129 N. W. 432)."

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relief even in an equitable proceeding. She is in the position

of a vendee who violates her contract and seeks to make that



violation the basis for the return of the money she has paid upon the contract.

If this were a case where plaintiff was attempting to rescind the contract and to recover the payments made on account of the purchase price she would have to show that she was not in default herself, that defendants were in default, and she would have to offer to pay the entire purchase money. (See Foster v. Jared, 12 Ill. 451, 454, 455; Davison v. Hill, 1 App. 70, 74; Eames v. Der Germania Turn Verein, 8 Ill. App. 663, 673-676.) But as we have heretofore stated, the allegations of the complaint would not support a theory of rescission.

Plaintiff very briefly contends that the trial court erred in carrying back plaintiff's motion to strike an answer to the complaint because there was an answer on file. It is sufficient to say, in answer to this contention, that a demurrer may be carried back even after a demurrer has been overruled and the defendant has pleaded over, when the declaration does not set out a cause of action on which a judgment can be sustained. (See People v. City of Spring Valley, 129 Ill. 169.) In the instant case, plaintiff stood by the second amended complaint and if we are right in holding, as we do, that the second amended complaint does not set up a cause of action, proceeding with a trial upon the said complaint would have availed plaintiff nothing. Defendants' counsel asserts in their brief that plaintiff's counsel consented to have the motion to strike the answer carried back to the second amended complaint and told the trial judge that he would be glad to have a decision on the question whether the second amended complaint stated a cause of action. This statement of defendants' counsel is not denied in the reply brief of plaintiff.

Several other contentions raised by plaintiff have been considered and found without merit.

The defendants in the instant case were unusually indulgent

violation the basis for the return of the money and the fact that  
the contract.

Therefore stated, the allegations of the complaint would not support a theory of rescission.

the reply brief of plaintiff.

action. This statement of defendants' counsel is not denied in question whether the second amended complaint stated a cause of the trial judge that he would be glad to have a decision on the the answer carried back to the second amended complaint and told that plaintiff's counsel requested to have the motion to strike plaintiff's nothing. Defendants' counsel stated in their brief proceeding with a trial upon the said complaint would have resulted that the second amended complaint does not set up a cause of action, second amended complaint and if we set aside in holding, as we do, Valley, 129 Ill. 169. In the instant case, plaintiff stood by the on which a judgment can be sustained. (See People v. City of Chicago, 129 Ill. 169.) When the declaration does not set out a cause of action pleaded over, back even after a demurrer has been overruled and the defendant has to say, in answer to this contention, that a demurrer may be granted in carrying back plaintiff's motion to sustain an answer to this complaint because there was no cause of action. It is defendant's Plaintiff very briefly responds that the declaration stated a cause of

Several other conditions related by informant have been seen  
 and described as follows:

The defendants in the instant case were unusually indigent

-18-

and there is not a trace of unfairness in their conduct toward plaintiff.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.

and there is not a trace of unbalance in their conduct toward

plaintiff.

The judgment of the Circuit court of Cook county is

affirmed.

TESTED AND SIGNED

Sullivan and Friend, Jr., counsel.

41845

EUGENE MOURANT,  
Appellee and Cross-Appellant,

44  
APPEAL FROM THE MUNICIPAL  
COURT OF CHICAGO.

THE FULLMAN TRUST & SAVINGS BANK,  
an Illinois Corporation,  
Appellant and Cross-Appellee.

314 I.A. 567<sup>2</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an action at law to recover certain payments made on a contract for the purchase of certain real estate, on the ground that at the time of the execution of the contract and the making of the payments the plaintiff was an infant. The case was tried by the court without a jury and there was a finding and judgment in favor of plaintiff and against defendant for \$556.67. Defendant appeals.

On February 15, 1926, plaintiff, through his mother, Addie Mourant, as he alleges in his statement of claim, entered into a contract with defendant to purchase a certain lot. The purchase price was \$1,400, payable as follows: \$350 at the time of the signing of the contract and the balance in quarterly installments of \$66 or more, with interest at six per cent per annum on the amount of principal remaining from time to time unpaid. The vendee also agreed to pay all regular taxes and special assessments levied on said lot after the date of the contract. Defendant, in its pleadings, denies that plaintiff entered into the contract and alleges that plaintiff's mother was either the sole party purchaser under the contract and had the sole interest therein or that she was a party jointly with plaintiff and had at least a one-half interest therein. The following are the only payments made on the contract: \$350 paid on the principal at the time of the signing of the contract, February 15, 1926; \$66 paid on September 8, 1926, of which amount \$50.50 was applied on account of principal, and \$15.50 on account of interest; \$6.69 paid on May 2, 1927, for general taxes for the year

JUDITH MONTANT, Appellant and Cross-Appellant

THE TRUMAN TRUST & SAVINGS BANK, an Illinois Corporation, Appellant and Cross-Appellee.

MR. PRESIDING JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

This is an action at law to recover certain payments made on a contract for the purchase of certain real estate, on the ground that at the time of the execution of the contract and the making of the payments the plaintiff was an infant. The case was tried by the court without a jury and there was a finding and judgment in favor of plaintiff and against defendant for \$256.67. Defendant appeals.

On February 15, 1926, plaintiff, through his mother, Addie Montant, as he alleges in his statement of claim, entered into a contract with defendant to purchase a certain lot. The purchase price was \$1,400, payable as follows: \$250 at the time of the signing of the contract and the balance in quarterly installments of \$66 or more, with interest at six per cent per annum on the amount of principal remaining from time to time unpaid. The vendor also agreed to pay all regular taxes and special assessments levied on said lot after the date of the contract. Defendant, in its pleadings, denies that plaintiff entered into the contract and alleges that plaintiff's mother was either the sole party purchaser under the contract and had the sole interest therein or that she was a party jointly with plaintiff and had at least a one-half interest therein. The following are the only payments made on the contract: \$350 paid on the principal at the time of the signing of the contract; February 15, 1926; \$66 paid on September 8, 1926, of which amount \$50.50 was applied on account of principal, and \$15.50 on account of interest; \$6.66 paid on May 2, 1927, for general taxes for the year

1926; <sup>and</sup> \$22.13 paid on November 8, 1928, for special assessments for water service and sewers. These payments were made by plaintiff's mother by checks drawn by her on her own personal checking account in the National Bank of Woodlawn. Plaintiff testified that his mother used his money in making all of the payments. Defendant claimed that it was the mother's money and not the plaintiff's that was used. The trial court found that plaintiff's mother made the contract for plaintiff and used his money in making the payments, and we see no good reason for disturbing that finding.

As plaintiff was born on September 22, 1908, he became of legal age on September 22, 1929. On April 11, 1929, defendant bank wrote plaintiff a letter, which he received, calling his attention to his defaults in making payments on the contract and demanding "that a substantial payment be made on this at once as this account has been long past due." On March 24, 1931, defendant wrote plaintiff another letter, received by him, in which the terms of the contract and the purchaser's defaults in payment of principal and interest are set forth fully and a demand is made for a substantial payment on the amount due. On June 29, 1931, defendant wrote plaintiff a letter, received by him, calling his attention to the fact that certain installments of certain special assessments were past due and requesting that he promptly pay the same. Plaintiff made no answer to these letters and took no action in reference thereto. On June 10, 1938, defendant served a demand for payment upon Eugene Mourant and Addie Mourant, which communication warned them "that if you fail to pay said entire indebtedness within thirty days from the date hereof, the undersigned will show you no further indulgence, and that the undersigned insists on a strict compliance by you with the literal and strict terms of said contract, and if said entire indebtedness is not paid within thirty days from the date hereof, the undersigned intends to forfeit all your right, title and interest in and to said contract and in and to the real estate therein ~~mentioned~~."





described." On July 16, 1938, defendant served a declaration of forfeiture upon Eugene Mourant and Addie Mourant. On July 5, 1938, plaintiff served upon defendant a notice in which he "refuses to ratify said contract as regards any interest he may have thereunder, does repudiate and disaffirm said contract and all rights or liability thereunder on the ground that at the time the contract was entered into between the parties, he was an infant." Plaintiff testified that he "never did any act in disaffirmance of the contract prior to July 5, 1938." On August 2, 1938, plaintiff made a demand on defendant for the return of the moneys paid under the contract, and upon the refusal of defendant to return the said moneys he filed this suit, on May 1, 1939.

A number of grounds are urged by defendant in support of its contention that the judgment should be reversed. In our view of this appeal it is only necessary to consider one.

Defendant contends: (a) "If plaintiff [under the admitted facts] had been of legal age at the time of the execution of the contract, he could not get his alleged money back." (b) "An infant must disaffirm his contract within a reasonable time after he becomes of legal age and failing to do so, he loses his right of disaffirmance and is bound by the contract as though he had been an adult at the time of its execution." Contention (a) is a meritorious one. (See our decision filed this day in Mourant v. The Pullman Trust & Savings Bank et al., Gen. No. 41,784.) As to contention (b): Plaintiff admits by his pleading and his testimony that he did not disaffirm the contract until eight years, nine months and thirteen days after he became of legal age; that he did not file his suit until nine years, seven months and nine days after he became of legal age. No other reasonable conclusion can be drawn from the record in this case than that plaintiff, after he became of age, abandoned the contract, and that the claim made in the instant suit, filed after the declaration of forfeiture, was an

described." On July 10, 1938, defendant served a declaration of  
forfeiture upon Eugene Leonard and Eddie Leonard. On July 9, 1938,  
plaintiff served upon defendant a notice in which he "proposes to  
ratify said contract as regards any interest he may have therein,  
does repudiate and disaffirm said contract and all rights or liability  
thereunder on the ground that at the time the contract was entered  
into between the parties, he was an infant." Plaintiff testified  
that he "never did any act in disaffirmance of the contract prior  
to July 5, 1938." On August 2, 1938, plaintiff made a demand on  
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adult at the time of its execution." Contentions (a) is a meritorious  
one. (See our decision filed this day in Leonard v. The Farmers  
Trust & Savings Bank et al., Gen. No. 41,784.) As to contention  
(b): Plaintiff admits by his pleading and his testimony that he  
did not disaffirm the contract until eight years, nine months and  
thirteen days after he became of legal age; that he did not file  
his suit until nine years, seven months and nine days after he  
became of legal age. No other reasonable conclusion can be drawn  
from the record in this case than that plaintiff, after he became  
of age, abandoned the contract, and that the claim made in the in-  
stant suit, filed after the expiration of forfeiture, was an

afterthought. The only ground for disaffirmance set up in plaintiff's pleadings is that he was an infant at the time the contract and the payments were made.

In Swiney v. Womack, 343 Ill. 278, where it was sought to hold Womack liable on a deed, contract and notes executed when he was a minor, the court said (p. 287): "Contracts and notes made by infants are voidable and may be repudiated within a reasonable time after the infant reaches full age. (Rubin v. Strandberg, 288 Ill. 64; Wright v. Buchanan, 287 id. 468.)"

In Sayles v. Christie, 187 Ill. 420, the court said (p. 437):

"Conveyances, made by infants in person, are voidable only, to be confirmed or repudiated at their discretion after they arrive at years of minority. (Cole v. Pennoyer, 14 Ill. 158; Walker v. Ellis, 12 id. 470). A conveyance of real estate by a minor must be disaffirmed and repudiated by him within three years after his majority, or it will be upheld; that is to say, the time, within which an infant after reaching majority must revoke a conveyance made during minority, is the period of three years after arriving at such majority. A neglect or failure to disaffirm the deed within that time will be held to be a ratification of it. (Blankenship v. Stout, 25 Ill. 132; Keil v. Healey, *supra* [84 Ill. 104].)"

In Keil v. Healey, 84 Ill. 104, the court said (p. 107):

"The time within which an infant, after majority, should revoke a conveyance made during minority, can not be regarded an open question in this State. In Blankenship v. Stout, 25 Ill. 132, it was held, that a person who has conveyed lands during infancy, was bound to disaffirm the deed within three years after arriving at majority, and a neglect or failure to do so would be held to be a ratification of the conveyance. This rule was adopted from analogy to a section in the Limitation Law of 1839, which required one under disability to bring an action within three years after

one under disability to bring an action within three years after analogy to a section in the Limitation Law of 1839, which required a ratification of the conveyance. This rule was adopted from was bound to disaffirm the deed within three years after arriving it was held, that a person who has conveyed lands during infancy, open question in this State. In Blanchard v. Stout, 25 Ill. 132, revoke a conveyance made during minority, can not be regarded as "The time within which an infant, after majority, should In Keil v. Healey, 84 Ill. 104, the court said (p. 107): Stout, 25 Ill. 132; Keil v. Healey, supra [84 Ill. 104]."

first time will be held to be a ratification of it. (Blanchard v. Stout, 25 Ill. 132). A neglect or failure to disaffirm the deed within made during minority, is the period of three years after arriving which an infant after reaching majority must revoke a conveyance majority, or it will be upheld; that is to say, the time, within disaffirmed and repudiated by him within three years after his Wills, 12 Id. 470). A conveyance of real estate by a minor must be at years of minority. (Cole v. Fennoyer, 14 Ill. 158; Walker v. to be confirmed or repudiated at their discretion after they arrive "Conveyances, made by infants in person, are voidable only, In Gavies v. Christie, 137 Ill. 420, the court said (p. 437): Ill. 64; Wright v. Bushman, 287 Id. 468.)"

time after the infant reaches full age. (Wright v. Bushman, 288 by infants are voidable and may be "rescinded within a reasonable was a minor, the court said (p. 287): "Contracts and notes made hold Kosack liable on a deed, contract and notes executed when he to Swiney v. Kosack, 343 Ill. 285, where it was sought to and the payments were made.

title's pleadings is that he was an infant at the time the contract afterthought. The only ground for disaffirmance set up in plain-

the disability was removed.

"The same rule was adopted in Cole v. Pennover, supra [14 Ill. 158], and we perceive no reason why it should be changed.

"If the infant has been imposed upon, and his lands obtained for less than an adequate consideration, certainly three years after he attains majority is time enough to determine that fact, and bring an action to recover the property."

Since the last two cases were decided the Legislature has shortened the period from three years to two years. (See par. 22, Limitations Act (Ill. Rev. Stat. 1941, ch. 83, par. 22, sec. 21.)

Chicago Telephone Co. v. Schulz, 121 Ill. App. 573, involved an action for personal injuries wherein the plaintiff had repudiated a release given during her minority within a year and four months after she attained her majority. The opinion states (pp. 582, 583):

"The plaintiff, May 2, 1899, when she was seventeen years and between two and three months of age, executed a release to the defendant. June 17, 1901, when she was nineteen years and four months of age, she, by letter to the defendant, disaffirmed the release. The court refused an instruction asked by defendant, to the effect that plaintiff did not repudiate the release within a reasonable time after attaining her majority. We are of opinion that the refusal of the instruction was proper. The Supreme Court, in Cole v. Pennover, 14 Ill. 158; Blankenship v. Stout, 25 id. 116; Rucker v. Dooley, 49 ib. 377, and Keil v. Healey, 84 ib., 104, have adopted the rule that an infant may avoid a deed of conveyance of land, made during minority, after attaining majority, within the time limited by the Statute of Limitations for bringing an action. We perceive no good reason why this rule should not apply equally to purely personal actions. The limitation in such cases as this is two years. Hurd's Statutes, 1903, p. 1207, sec. 14. The plaintiff repudiated the release within two years after she attained her

the disability was removed,

"The same rule was adopted in Loft v. Thompson, supra [14]

III. 150], and we perceive no reason why it should be changed.

"If the infant was been imposed upon, and his lands obtained

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an action to recover the property."

Since the last two cases were decided the Legislature has

shortened the period from three years to two years. (See par. 32,

Limitations Act (III. Rev. Stat. 1901, ch. 92, par. 32, and 33.)

Chicago Telephone Co. v. Republic, 111 Ill. App. 577, involved

an action for personal injuries wherein the plaintiff had requested

a release given during her minority within a year and four months

after she attained her majority. The opinion states (pp. 582, 583):

"The plaintiff, May 2, 1898, when she was seven years

and between two and three months of age, executed a release to the

defendant. June 17, 1901, when she was nineteen years and four

months of age, she, by letter to the defendant, disaffirmed the

release. The court refused an instruction asked by defendant, to

the effect that plaintiff did not repudiate the release within a

reasonable time after attaining her majority. The court of opinion

that the refusal of the instruction was proper. The Supreme Court,

in Gale v. Fennoyer, 14 Ill. 158; Blackburn v. Stuart, 37 Ill. 110;

Broder v. Dooley, 49 Ill. 377, and Kelly v. Fennoyer, 34 Ill. 104, have

adopted the rule that an infant may avoid a deed of conveyance of

land, made during minority, after attaining majority, within the

time limited by the statute of limitations for bringing an action.

We perceive no good reason why this rule should not apply equally

to purely personal actions. The limitation in such cases as this

is two years. Hurd's Statutes, 1903, p. 1207, sec. 14. The plain-

majority, after which she brought suit June 20, 1901, also within the two years." (*Italics ours.*) The court, in that case, applied the limitation period of two years in determining the question as to whether plaintiff had repudiated the release within a reasonable time after attaining her majority.

In *Black on Rescission of Contracts and Cancellation of Written Instruments*, 2d Ed. (1929), Vol. 2, Sec. 537, the author states: "A person who was under a disability at the time he entered into a contract, and who has the right to rescind it, either on account of such disability or for other cause, is not chargeable with laches in failing to take steps for rescission while the disability still continues, but he must act with reasonable promptness after its removal. Thus, if a party to a contract was an infant at the time it was made, and the contract is of such a nature that he has the right to disaffirm it on account of his infancy, he must do so within a reasonable time after he attains his majority, and if he fails to do so, he will be held to have affirmed it."

In Burnet v. Chapin, 274 Ill. App. 186, this division of the court held that the infant had a reasonable time after he attained his majority to disaffirm the contract, and that his disaffirmance two months after he attained his majority was manifestly within the rule.

Plaintiff's counsel makes the strained argument that plaintiff had no cause of action until he disaffirmed on July 5, 1938, and that he had five years after that date in which to sue defendant. Plaintiff was nearly thirty years of age when he disaffirmed. If he could wait until he was thirty years of age before disaffirming and then have five years thereafter in which to commence suit, why could he not wait until he was forty or fifty years of age before he disaffirmed? He was called upon to speak one year, six months and two days after he became of age. He was again called upon to speak on June 29, 1931, one year, nine months and seven days after he became

majority, after which she brought suit June 20, 1901, also within the two years." (Italics ours.) The court, in that case, applied the limitation period of two years in determining the question as to whether plaintiff had repudiated the release within a reasonable time after attaining her majority.

In Black on Rescission of Contracts and Cancellation of Written Instruments, 24 Ed. (1929), Vol. 2, Sec. 237, the author states: "A person who was under a disability at the time he entered into a contract, and who has the right to rescind it, either on account of such disability or for other cause, is not chargeable with laches in failing to take steps for rescission while the disability still continues, but he must act with reasonable promptness after its removal. Thus, if a party to a contract was an infant at the time it was made, and the contract is of such a nature that he has the right to disaffirm it on account of his infancy, he must do so within a reasonable time after he attains his majority, and if he fails to do so, he will be held to have affirmed it."

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of age. Yet he did not speak or take any action upon either occasion.

In Wise v. Loeb, 15 Pa. Superior Ct. Reports, 601, the court, in holding a minor liable on a contract and judgment note executed during his minority, said (p. 604):

"The question as to the defendant's minority, when the contract, of which the note was evidence in part, was entered into, and his right to avoid it for that reason, was, we think, properly disposed of by the court below. 'When the infant attains majority and does not mean to stand by a contract made in infancy, his proper course is to disaffirm it by an act as solemn as that by which it was made; and ratification may be inferred from his failure to disaffirm within a reasonable time after coming of age, as well as from positive recognition of the contract'; 8 P. & L. Dig. of Dec. 13997. The defendant had an opportunity to be heard in disaffirmance of his contract, when he presented his petition to the court to have the judgment opened. It was his duty, when first called upon to speak, to disaffirm the contract, if he intended to avoid it by reason of his minority. His failure to do so must be regarded as an affirmance. It was too late to raise the question upon the trial."

We hold that plaintiff did not repudiate the contract within a reasonable period after he reached full age.

Plaintiff in this court seeks to raise the question of the Statute of Frauds, viz., that his mother had no written authority to sign his name to the contract. The right to invoke the Statute of Frauds was personal to plaintiff and he did not rely upon that right in the trial court. The statement of claim alleges that plaintiff, "by his mother, Addie Mourant, entered into a contract," etc., and he testified that he asked his mother to sign the contract and that she used his money in making the payments. Plaintiff, in his notice of disaffirmance, disaffirmed solely upon the ground of

of age. Yet he did not speak or take any action upon either occasion.

In Wise v. Loop, 15 Pa. Superior Ct. Reports, 601, the

court, in holding a minor liable on a contract and judgment note executed during his minority, said (p. 604):

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contract, of which the note was evidence in part, was entered into, and his right to avoid it for that reason, was, we think, properly disposed of by the court below. When the infant attains majority and does not mean to stand by a contract made in infancy, his proper course is to disaffirm it by an act as solemn as that by which it was made; and ratification may be inferred from his failure to dis-

affirm within a reasonable time after coming of age, as well as from positive recognition of the contract; 8 P. & D. Dig. of Dec. 13997. The defendant had an opportunity to be heard in disaffirmance of his contract, when he presented his petition to the court to have the judgment opened. It was his duty, when first called upon to speak, to disaffirm the contract, if he intended to avoid it by reason of his minority. His failure to do so must be regarded as an affirmance. It was too late to raise the question upon the trial."

We hold that plaintiff did not repudiate the contract within

a reasonable period after he reached full age.

Plaintiff in this court seeks to raise the question of the Statute of Frauds, viz., that his mother had no written authority to sign his name to the contract. The right to invoke the Statute of Frauds was personal to plaintiff and he did not rely upon that right in the trial court. The statement of claim alleges that plaintiff, "by his mother, Abbie Mount, entered into a contract," etc., and he testified that he asked his mother to sign the contract and that she used his money in making the payments. Plaintiff, in his notice of disaffirmance, disaffirmed solely upon the ground of

infancy. He cannot try his case upon one theory in the trial court and upon another theory in this court.

It is the rule in this State, as Stated in Swiney v. Womack, supra, that contracts and notes made by infants are voidable and may be repudiated within a reasonable time after the infant reaches full age. It is also true that in determining what is a reasonable time our courts have sometimes adopted the two years period in the Statute of Limitations even where the case did not involve the conveyance of land. But our courts have never held that "a reasonable time" may exceed the two years period of time prescribed by the said Statute for bringing an action. Nor have they ever held that the former infant can toll the Statute of Limitations by delaying his disaffirmance after he becomes of legal age. Plaintiff is bound by the contract; he has for many years failed to carry out his obligations under it, and the judgment of the Municipal court of Chicago entered January 27, 1941, is reversed in toto.

We have reversed the judgment of that date in toto for the reason that the trial court, in addition to entering judgment in favor of plaintiff and against defendant for \$556.67 also entered in the judgment order a judgment in favor of defendant and against plaintiff in the sum of \$17.50. Plaintiff has filed a cross-appeal as to the judgment against him and he has properly raised and argued the action of the trial court in entering said judgment. Defendant has not seen fit to answer plaintiff's argument as to the cross-appeal and we must conclude that defendant concedes that the entry of the judgment in its favor was unwarranted.

JUDGMENT ORDER ENTERED JANUARY  
27, 1941, REVERSED IN TOTO.

Sullivan and Friend, JJ., concur.

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It is the rule in this state, as stated in *Wheeler v. Wheeler*, 100 Ill. 400, that contracts and notes made by infants are voidable and may be repudiated within a reasonable time after the infant reaches full age. It is also true that in determining what is a reasonable time our courts have sometimes adopted the two years period in the Statute of Limitations even where the case did not involve the conveyance of land. But our courts have never held that "a reasonable time" may exceed the two years period of time prescribed by the said Statute for bringing an action. Nor have they ever held that the former infant can toll the Statute of Limitations by delaying his claim—once after he becomes of legal age. Plaintiff is bound by the contract; he has for many years failed to carry out his obligations under it, and the judgment of the Municipal Court of Chicago entered January 27, 1941, is reversed in toto.

We have reversed the judgment of that date in toto for the reason that the trial court, in addition to entering judgment in favor of plaintiff and against defendant for \$750.00 also entered in the judgment order a judgment in favor of defendant and against plaintiff in the sum of \$17.50. Plaintiff has filed a cross-appeal as to the judgment against him and he has properly raised and argued the action of the trial court in entering said judgment. Defendant has not seen fit to answer plaintiff's argument as to the cross-appeal and we must conclude that defendant concedes that the entry of the judgment in its favor was unwarranted.

JUDGMENT ORDER ENTERED JANUARY  
27, 1941, IS REVERSED IN TOTO.

Sullivan and Friend, 37, counsel.

41871

ANNA PIETROLONARDO,  
Appellee,

v.

JAY R. HOUGHTELING, HELEN  
HOUGHTELING and PIONEER  
TRUST & SAVINGS COMPANY, a  
corporation,  
Appellants.

45  
APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

314 I.A. 568'

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Jay R. Houghteling and his wife, Helen, were owners of a two-story building on Fullerton avenue, Chicago, which was maintained and managed for them by the Pioneer Trust & Savings Bank. The building consisted of a store with an apartment above, which was occupied under a month-to-month tenancy by plaintiff's family, including her married son. Plaintiff fell and was injured on a stairway leading from the vacant store to the basement of the building. She brought suit against the Houghtelings as owners and the bank as manager of the premises, upon the theory that the stairway was common to all the tenants, but on trial she amended her complaint to the theory that she was an invitee in the use of the stairway, which was alleged to have been carelessly and negligently maintained in a dangerous and unsafe condition. Trial by jury resulted in a verdict and judgment against all defendants for \$7,500, from which they have taken this appeal.

The salient facts taken from a record embracing some 700 pages may be summarized as follows. The premises consist of a 25-foot frontage facing south on Fullerton avenue, improved with a brick building consisting of a basement, a store on the first floor and an apartment on the second floor. The entrance to the store is by a door in the center of the premises on Fullerton avenue and another door in the rear. Inside the store, about halfway between the front and rear and on the west side thereof, was a stairway used only by the occupants of the store for entering

ANNA PISTONOWICZ  
Appellee

v.

JAY R. HOUGHTALING, TRUSTEES  
HOUGHTALING AND BROTHERS  
TRUST & SAVINGS COMPANY,  
Appellants,  
CORPORATION

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

311-1-16

MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

Jay R. Houghtaling and his wife, Helen, were owners of a two-story building on Fullerton avenue, Chicago, which was maintained and managed for them by the Houghtaling Trust & Savings Bank. The building consisted of a store with an apartment above, which was occupied under a month-to-month tenancy by Plaintiff's family, including her married son. Plaintiff fell and was injured on a stairway leading from the vacant store to the basement of the building. She brought suit against the defendants as owners and the bank as manager of the premises, upon the theory that the stairway was common to all the tenants, but on trial she amended her complaint to the theory that she was an invitee in the use of the stairway, which was alleged to have been carelessly and negligently maintained in a dangerous and unsafe condition. Trial by jury resulted in a verdict and judgment against all defendants for \$7,500, from which they have taken this appeal.

The salient facts taken from a record embracing some 700 pages may be summarized as follows. The premises consisted of a 25-foot frontage facing south on Fullerton avenue, improved with a brick building consisting of a basement, a store on the first floor and an apartment on the second floor. The entrance to the store is by a door in the center of the premises on Fullerton avenue and another door in the rear. Inside the store, about halfway between the front and rear and on the west side thereof, was a stairway used only by the occupants of the store for entering

and leaving the basement. There is no stairway inside the building which gives the second-floor tenant access from the second floor to the basement. Access to the basement by the tenant of the apartment is through an outside stairway in the rear of the premises. An outside door at the west side of the front of the building leads through the hallway to the second floor, and a door just inside this doorway affords entrance into the store. In the rear of the building, in addition to the basement stairway which is outside, there is also an outside stairway leading to the back porch of the second-floor apartment, which is intended for the use of the second-floor tenant only.

November 27, 1937 both the store and the apartment were vacant. On that day plaintiff's son Frank Pietrolonardo, on behalf of his father and mother, made inquiry at the bank with respect to leasing the apartment. He talked to Mr. Edward J. Kucera, secretary of the bank, who told him the rent would be \$30 a month and gave him the keys so that he might inspect the premises with his mother and his wife. On the tour of inspection he attempted to gain access to the basement from the rear, where he found a wooden and also a steel door. He testified that he opened the wooden door but found the steel door frozen to the ground. Returning to the bank, he had further conversation with Kucera and testified that he told him, "I am not going to use the back stairway the way it is now. If you will let us use the front stairway, make some kind of agreement about that, I will take it, otherwise I won't," to which Kucera is said to have replied, "I will give you keys of the store and if anybody should come over here I will send them over there and you show them the store." After further surveying the premises Frank complained about the back stairway, saying there were four or five inches of ice there, that the back basement door could not be opened because it was frozen from the outside, and that

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he then made an agreement with Kucera by which plaintiff's family could use the stairway leading from the store to the basement, so long as the store remained vacant, with the understanding that as soon as the store was leased, he and his family would probably move out.

The Pietrolonardo family moved into the apartment December 10, 1937. Plaintiff testified that December 24 a man, whose name is not disclosed by the evidence and whose description is only vaguely given, rang the door bell and said that he had been sent there by the bank as a prospective tenant of the store. Plaintiff, who spoke very little English and testified through an interpreter, thereupon called her son, who was in the bathroom, and he asked her to show the store, which she proceeded to do. After viewing the premises, this man asked to see the basement. Plaintiff's family had been using the basement to wash their clothes and to store some of their personal effects. The day before she had washed some clothes, and her testimony was to the effect that she intended going to the basement with the prospective tenant for the dual purpose of showing him the basement and gathering the clothes which she had hung there the day before. She opened the door to the basement, put her hand against the wall and turned on the light as she started downstairs. The defect in the stairway of which she complains was a structural defect which had been in the same condition since the building was erected. The subflooring of the store projected about an inch and one-half farther than the hardwood flooring. The light in the basement cast only scant illumination on the landing, and as plaintiff was about to descend the stairway through the door from the store, her heel caught on this subflooring projection and she fell down the stairs and fractured her arm. She testified that the man whose name was not given or asked assisted in carrying her upstairs. The accident was not reported to any of defendants until April 1938 some four months later, when Kucera

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came to the apartment to serve a five-day notice on plaintiff's family for failure to pay rent. He observed plaintiff's arm in a sling and she then told him that she had fallen on the basement stairway. The Pietrolonardo family vacated the premises about three months thereafter.

Among the various reasons urged for reversal, defendants contend that the manifest weight of the evidence is in their favor on all questions at issue and that the court should have directed a verdict in their favor. The original complaint proceeded on the theory that this was a stairway used in common by the tenants and the public. On hearing of the motion for a new trial, plaintiff had leave to amend her complaint on its face by inserting the words "at the invitation of the defendants and each of them," thus predicated her right to recovery on the theory that she was an invitee and abandoning the common stairway theory. Defendants argue that the original complaint clearly shows that the pleader had not been told about any agreement for use by plaintiff's family of the stairway leading from the store because of any lease or agreement made with Frank at the time of the leasing, and that the pleader had in mind only that there was a common stairway for the use of all tenants and the public in general, and they say that the amendment, made so late in the proceeding, constitutes an admission "that the story and the theory were changed between the date of the drafting of the complaint and the trial," and was necessitated by the fact that the theory of the original complaint could not be sustained by the evidence adduced upon the trial. It appears from the record that in December 1938 defendants sent an investigator and a court reporter to ascertain how plaintiff had been injured, and counsel say that in an inquiry, in which the whole Pietrolonardo family participated, the questions propounded and the answers made indicated that plaintiff had gone into the basement to fire the furnace; that her son who was upstairs when she fell heard her cry out and carried

came to the apartment to serve a five-day notice on plaintiff's family for failure to pay rent. He observed plaintiff's car in a alley and she then told him that she had fallen on the basement stairway. The Petrofomando family vacated the premises about three months thereafter.

Among the various reasons urged for reversal, defendants contend that the manifest weight of the evidence is in their favor on all questions at issue and that the court should have directed a verdict in their favor. The original complaint proceeded on the theory that this was a stairway used in common by the tenants and the public. On hearing of the motion for a new trial, plaintiff had leave to amend her complaint on its face by inserting the words "at the invitation of the defendants and each of them," thus predicting her right to recovery on the theory that she was an invitee and abandoning the common stairway theory. Defendants argue that the original complaint clearly shows that the pleader had not been told about any agreement for use by plaintiff's family of the stairway leading from the store because of any lease or agreement made with Frank at the time of the leasing, and that the pleader had in mind only that there was a common stairway for the use of all tenants and the public in general, and they say that the amendment, made so late in the proceeding, constitutes an admission "that the story and the theory were changed between the date of the drafting of the complaint and the trial," and was necessitated by the fact that the theory of the original complaint could not be sustained by the evidence adduced upon the trial. It appears from the record that in December 1938 defendants sent an investigator and a court reporter to ascertain how plaintiff had been injured, and counsel say that in an industry, in which the whole Petrofomando family participated, the questions propounded and the answers made indicated that plaintiff had gone into the basement to fire the furnace; that her son who was upstairs when she fell heard her cry out and carried

her upstairs, and defendants argue that the story about the prospective tenant is fictitious and that plaintiff was not injured in the manner or under the circumstances to which she testified. As further support of this contention it is urged that no report of the accident was made to defendants until four months later, when notice was served upon them for failure to pay rent; that they moved from the premises in the early hours of the morning in July of 1938 and instituted suit shortly thereafter.

Defendants take the position that plaintiff was either a trespasser or a licensee, to whom they owed no such duty as is required to be accorded an invitee. They were justified in trying the case on that theory. After a careful examination of the evidence we have reached the conclusion that the verdict is contrary to the manifest weight of the evidence upon the newly adopted theory under which plaintiff now seeks to justify the verdict. Because the cause may have to be retried, we refrain from commenting extensively on the evidence.

The judgment of the Circuit court is accordingly reversed and the cause remanded for retrial.

JUDGMENT REVERSED AND CAUSE  
REMANDED.

Scanlan, P. J., and Sullivan, J., concur.

for plaintiffs, and defendants argue that the only way the process-  
five tenant is fictitious and that plaintiff's position is based in the  
manner or under the circumstances to which she testified, as further  
support of this contention it is urged that no report of the landlord  
was made to defendant until long after the time when notice was  
served upon them for failure to pay rent; that they moved from the  
premises in the early part of the month of July of 1923 and  
instituted suit shortly thereafter.

Defendants take the position that plaintiff was either a  
tenant or a licensee, so when they owed no rent, it was as in  
regard to be accorded an invitee. They were invited in trying  
the case on that theory. After a careful examination of the evi-  
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to the manifest weight of the evidence upon the newly adopted theory  
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on the evidence.

The judgment of the circuit court is accordingly reversed  
and the cause remanded for retrial.

JUDGMENT REVERSED AND CAUSE  
REMANDED.

SEANLAN, F. J., and SULLIVAN, J., concur.

41891

EDWIN HAMILTON,  
Appellee,

v.

THOMAS J. GRADY and  
WILEY W. MILLS, Trustee,  
etc.,  
Appellants.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

314 I.A. 568<sup>2</sup>

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff originally sued in assumpsit on a written contract for attorney's fees previously accrued, with an additional claim under common counts for subsequent services which were reduced to judgment and are not herein questioned. On the written contract defendant Grady had judgment, which was reversed on appeal and remanded for retrial, with the suggestion that the cause be transferred to the chancery side under amended pleadings to be filed (case No. 38285, not published). The cause was redocketed, transferred as suggested in our opinion, an amended and supplemental answer was filed by defendants attacking the contract for fraud and duress, and a counterclaim was also filed on like grounds asking the return of certain notes, mortgages and documents upon which plaintiff based his claim. The matter was referred to a master who, after an extended hearing embracing a voluminous record, found that the aggregate charge in excess of \$17,000 made by plaintiff for services rendered was not excessive or unreasonable and recommended that defendant Grady's counterclaim be dismissed for want of equity. In the course of the litigation an involuntary petition in bankruptcy was filed against Grady in 1935, and his trustee, Wiley W. Mills, had leave to join in the proceeding. This appeal is prosecuted by Grady and Mills, as trustee, to review the decree entered by the chancellor pursuant to the master's recommendations.

Although the evidence as to the material issues involved

41891

EDWIN HAMMILLON  
Appellee

v.

THOMAS J. GRADY and  
WILEY W. MILLIS, Trustees,  
etc.,  
Appellants.

APPEAL FROM CIRCUIT COURT,  
COCK COUNTY.

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808

MR. JUSTICE PRINCE DELIVERED THE OPINION OF THE COURT.

Plaintiff originally sued in assumpsit on a written contract for attorney's fees previously accrued, with an additional claim under common counts for subsequent services which were refused to judgment and are not herein questioned. On the written contract defendant Grady had judgment, which was reversed on appeal and remanded for retrial, with the suggestion that the cause be transferred to the chancery side under amended pleadings to be filed (case No. 38285, not published). The cause was retaken, transferred as suggested in my opinion, an amended and supplemented answer was filed by defendants attacking the contract for fraud and duress, and a counterclaim was also filed on like grounds asking the return of certain notes, mortgages and documents upon which plaintiff based his claim. The matter was referred to a master, who, after an extended hearing embracing a voluminous record, found that the aggregate charge in excess of \$17,000 made by plaintiff for services rendered was not excessive or unreasonable and recommended that defendant Grady's counterclaim be dismissed for want of equity. In the course of the litigation an involuntary petition in bankruptcy was filed against Grady in 1935, and his trustee, Wiley W. Millis, had leave to join in the proceeding. This appeal is prosecuted by Grady and Millis, as trustee, to review the decree entered by the chancellor pursuant to the master's recommendations.

Although the evidence as to the material issues involved



is sharply conflicting, there is no dispute as to certain salient facts. Hamilton, an attorney at law, was first retained by the defendant Grady October 1, 1930 to represent him in divorce proceedings then pending in the Superior court. The cause was determined adversely to Grady and the decree was affirmed by the Appellate court. Hamilton also claims to have served Grady in other matters, including an equity proceeding wherein one Regan sought to establish a partnership in one-half of valuable properties owned by Grady, but no proof was offered as to the time, amount or value of such services. There is evidence of record, most of which is denied by Grady, that Hamilton rendered statements of account on various dates between October 1, 1930 and September 21, 1931, and that letters passed between the parties wherein Grady acknowledged the receipt of bills for services and indicated that he would try to arrange for payment, at the same time criticizing the amount charged by Hamilton. The oral agreement for payment of fees to Hamilton, purported to have been made when he was first retained to represent Grady in the then pending divorce proceeding, is the subject of considerable conflict. Grady asserts that Hamilton then agreed to substitute for counsel of record and to assume sole charge of his interests for a fee not to exceed \$1,500. ~~Hamilton~~ Hamilton contends that they agreed upon a retainer of \$1,500 and also \$100 a day and \$15 or \$20 an hour for part time. The master's finding is contrary to both versions, sustaining Hamilton as to the retainer but finding that Grady promised to pay such further compensation "as would be reasonable." In any event, Grady failed or refused to pay the bills which Hamilton says he rendered from time to time, and the crisis in their relationship was reached in the fall of 1931. Before that time Grady had paid Hamilton \$3,027 in cash, which is admitted, and he testified that this was in full and that he never agreed to pay more.

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Hamilton testified that in 1931, after a decree had been entered against Grady in the divorce proceeding and affirmed by the Appellate court, he advised Grady that he would no longer represent him unless his bills were paid. Letters passed between the parties, culminating in two meetings between them shortly before the execution of the written agreement upon which Hamilton's suit is predicated. Hamilton had prepared the written agreement containing a settlement and account stated and an undertaking by Grady to guarantee payment of two mortgage notes, one executed by William M. Hickey in 1927 for \$9,000, payable in three years, owned and held by Grady, and one note for \$5,000 made by Grady, as trustee, on September 1, 1930, wherein he promised to pay to his own order, three years after date, the sum of \$5,000 with interest. These notes were turned over to Hamilton, and the settlement agreement, bearing date October 1, 1931, which is the principal subject of controversy between the parties, wherein Grady acknowledged an indebtedness to Hamilton for his services in the sum of \$13,959, was then presented to Grady for signature. The material portions of the agreement read:

"That in consideration of the mutual covenants and agreements herein contained to be kept and performed by each of the parties hereto the said parties agree to and with each other as follows:

"Party of the first part acknowledges himself to be indebted to party of second part in the sum of Thirteen Thousand Nine Hundred Fifty-Nine (\$13,959.00) Dollars for disbursements made and services rendered by the party of the second part for and on behalf of or at the request of party of first part prior to the first day of October, A. D. 1931, and in consideration thereof hereby assigns, sets over and transfers to the party of the second part two certain trust deeds conveying real estate in the City of Chicago, and notes

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"That in consideration of the mutual covenants and agreements herein contained to be kept and performed by each of the parties hereto the said parties agree to and with each other as follows:

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secured thereby for the aggregate principal sum of Fourteen Thousand (\$14,000.00) Dollars, said trust deeds being recorded in the Recorders office of Cook County, Illinois, as documents Nos. 9874376 and 10769585 respectively. The party of the first part hereby guarantees the payment of said notes according to the terms and conditions thereof and according to the terms of the respective trust deeds securing same and shall not be released from this guarantee except by payment in cash.

"Party of the second part hereby settles the amount of the indebtedness from party of first part to the party of the second part in the sum of Thirteen Thousand Nine Hundred Fifty-Nine (\$13,959.00) Dollars and agrees to accept therefor said trust deeds and notes above mentioned according to the provisions hereof.

"It is further agreed that the party of the second part shall have full power and authority to sell, assign and deliver said Trust Deeds and notes, or any part thereof, at any time and in the event of such sale the party of the first part will pay the party of the second part any discount which the party of the second part may allow thereon not to exceed fifteen per cent."

Hamilton's case is predicated upon the theory that the mere introduction of his contract and of his notes and mortgages purporting to be assigned and guaranteed thereby entitles him to recovery without any showing of the amount or value of the legal services rendered by him, and, in fact, no such proof was offered. Defendants, on the other hand, contend that the services were fully paid for in cash, that the evidence affirmatively establishes that the contract and assignments were obtained by fraud and duress, that Hamilton being Grady's attorney at the time, it was incumbent on him affirmatively to show the fairness of the contract, the nature and extent of the services and the value thereof, and that Hamilton's refusal to disclose such facts precludes his recovery.

secured thereby for the aggregate principal sum of Twenty-two Thousand (\$22,000.00) Dollars, said trust deeds being recorded in the Recorder's office of Cook County, Illinois, as documents Nos. 10974375 and 10974376 respectively. The party of the first part hereby guarantees the payment of said notes according to the terms and conditions thereof and according to the terms of the respective trust deeds securing same and shall not be released from this guarantee except by payment in cash.

"Party of the second part hereby settles the amount of the indebtedness from party of first part to the party of the second part in the sum of Thirteen Thousand Nine Hundred Fifty-nine (\$13,959.00) Dollars and agrees to accept therefor said trust deeds and notes above mentioned according to the provisions hereof. "It is further agreed that the party of the second part shall have full power and authority to sell, assign and deliver said Trust Deeds and notes, or any part thereof, at any time and in the event of such sale the party of the first part will pay the party of the second part any discount which the party of the second part may allow thereon not to exceed fifteen per cent."

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These contentions lead to the principal question to be determined, namely, whether the relationship of attorney and client existed at or about the time the contract was made and what "pressure" or "duress" was exerted by Hamilton in inducing Grady to enter into the agreement. Upon this question there is considerable conflict in the evidence. Hamilton had carried on the divorce proceeding for Grady through decree and until after the decree was affirmed in the Appellate court. There was still time within which to apply for leave to appeal to the Supreme court of Illinois. The Regan case was also pending. Hamilton testified that he told Grady that "either he sign that guarantee or that I would have to part company with him and he would have to carry on his case alone," and Grady says that Hamilton demanded that he sign the contract before he would do anything further in the Regan case, and also that he threatened to turn over Grady's evidence, betray him to his adversary, and destroy him financially. Hamilton denies these charges. Aside from Grady's evidence and that of Hamilton, there is the latter's admission that he put "pressure" on Grady to sign the agreement.

Two other witnesses testified to circumstances which throw some light on the matter. One of these was Clara Berger, who performed stenographic and secretarial work for Grady from 1924 to 1935. She testified that she first met Hamilton in September 1931 in Grady's office; that she was familiar with the lawsuit wherein Regan was seeking to establish a partnership with Grady, and was present at a rather heated conversation between Grady and Hamilton September 30, 1931; that Hamilton came in with some papers in his pocket and went into Grady's office. Miss Berger remained in the reception room and she then heard Hamilton ask Grady to sign the papers. The conversation grew louder and louder, "and the first thing you know Mr. Grady was shouting about it and he said Mr.

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Two other witnesses testified to circumstances which throw some light on the matter. One of these was Clara Barker, who performed stenographic and secretarial work for Grady from 1924 to 1935. She testified that she first met Hamilton in September 1931 in Grady's office; that she was familiar with the law suit wherein Regan was seeking to establish a partnership with Grady, and was present at a rather heated conversation between Grady and Hamilton September 30, 1931; that Hamilton came in with some papers in his pocket and went into Grady's office. Miss Barker remained in the reception room and she then heard Hamilton ask Grady to sign the papers. The conversation grew louder and louder, "and the first thing you know Mr. Grady was shouting about it and he said Mr.



Hamilton was trying to take unfair advantage of him by asking him to sign an agreement like that, and Mr. Hamilton said something to the effect that, if he didn't agree to those terms that he would turn over information to the other side, meaning the people representing Regan. Mr. Grady got angry about that and said he would disbar him for it, and came out to the outer office and he asked me if I had heard what he had said, and I said, 'Yes,' " She further testified that she heard no conversation with respect to attorney's fees, and denied having typed a letter purported to have been written by Grady in answer to Hamilton's demand for payment of his bills, which Grady testified that he had never signed or written, although the master found adversely to him on this phase of the case.

In further corroboration of his defense Grady produced an attorney, Henry N. Miller, who testified that he had represented Grady in several cases dating back over a period of ten years or more. In the course of that relationship he had contact with Hamilton in the early part of October 1931. He recalled the first hearing at which testimony was taken in the Regan case before Master Robert Dunn and fixed the date as September 29, 1931. Between that time and October 6 he had a conversation with Hamilton in his office wherein the latter told him that he had been over to see Grady and had asked him to sign some papers relating to fees for services but that Grady had refused to execute the agreement; that he had told Grady he "wanted that contract signed, and if he did not sign it, he would ruin his cases. \*\*\* In that conversation Hamilton said that he put the pressure on Grady very strong. He told me he got the papers signed by Grady." Whether actual duress was exerted upon Grady is a question upon which we need not express an opinion, but the testimony of these two witnesses corroborates Hamilton's admission that he put "pressure" upon Grady to get the contract signed and that he told him "either he sign that guarantee or \*\*\* I would have to part company with him and he would have to carry on his case alone."

Hamilton was trying to talk and he was saying "I would like to sign an agreement like that," and Mr. Hamilton said, "I would like to sign an agreement like that," and he didn't agree to that, I think that's what he would turn over information to the other side, because the people representing Hogan, Mr. Grady got angry about that and said he would disbar him for it, and came out to the outer office and he asked me if I had heard what he had said, and I said, "Yes." She further testified that she heard no conversation with regard to attorney's fees, and denied having typed a letter purported to have been written by Grady in answer to Hamilton's demand for payment of his bills, which Grady testified that he had never signed or written, although the master found adversely to him on this phase of the case.

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Plaintiff cites our former opinion as his warrant for relying solely upon his purported written contract, but we do not think it is susceptible of this interpretation. Plaintiff having originally sued in assumpsit and equitable considerations having been interposed by way of defense, we merely held that the introduction of the notes was prima facie evidence of plaintiff's claim, and suggested upon reversal that when the case was redocketed, if defendant so desired he might seek a transfer from the common law to the chancery side of the court "where, upon amended pleadings, the consideration for the instruments may be impeached for fraud or duress, and if the evidence warrants it the instruments may be set aside, but upon such terms as are equitable and just between the parties." The courts of this state have consistently held that when a client attacks as unconscionable a contract with his attorney, whether it be for the excessiveness of the attorney's fees or for any other unfairness between the client and attorney, the client is not required to establish fraud or imposition, but the burden of proof is upon the attorney to show that the contract was entered into fairly, that the client was fully advised on all the facts, their adequacy and equity; and that upon the attorney's failure to make such proof, equity treats the case as one of constructive fraud. Jennings v. McConnel, 17 Ill. 148; Goranson v. Solomonson, 304 Ill. App. 80. Other decisions and authorities dealing with the same subject matter and following this doctrine are Ankrom v. Doss, 270 Ill. App. 464; Robinson v. Sharp, 201 Ill. 86; Warner v. Flack, 278 Ill. 303; and 2 Pomeroy Eq. Jur., sec. 960. The rule is not limited to transactions concerning the property involved in the litigation, but applies to any dealings between attorney and client, including contracts for fees and notes given therefor. Ankrom v. Doss, 270 Ill. App. 464; Faris v. Briscoe, 78 Ill. App. 242. It has also been held that before

plaintiff after our review of the case.

relying solely upon his proposed witness, the plaintiff

not think it is susceptible of this interpretation. The plaintiff

having originally and in substance and spirit, as stated above

having been introduced by way of defense, and in the light of the

introduction of the notes was not admitted as evidence.

claim, and suggested upon review that the plaintiff's

it defendant so desired he might seek a judgment from the common law

to the chancery side of the court where, upon review of the

the consideration for the instruments may be found. The finding

or guess, and if the evidence warrants it the law may be set

set aside, but upon such facts as are admitted and the law

the parties." The court of this case have conclusively held

that when a client attacks an unprofessional or unethical

attorney, whether it be for the excessive fees of the attorney

fees or for any other unprofessional or unethical conduct, the

the client is not required to establish fraud or imposition, but

the burden of proof is upon the attorney to show that the contract

was entered into fairly, that the client was fully advised as to

the facts, their adequacy and equity, and that upon the facts

failure to make such proof, equity treats the contract as void.

constructive fraud. Jennings v. Jennings, 17 Ill. 144; Wendell v.

Solomonson, 304 Ill. App. 80. Other decisions in this line

dealing with the same subject matter and the same result

are Adams v. Doss, 270 Ill. 401; Wright v. Wright, 17 Ill. 144.

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making any agreement with his client, the attorney must disclose all information which might affect the client's decision to agree to the contract. Broholm v. Anderson, 178 Ill. App. 623; Robinson v. Sharp, 201 Ill. 86. In conformity with this doctrine it was incumbent upon Hamilton to furnish the detailed facts and computations upon which the substantial fee which he claimed was predicated.

Hamilton takes the position, however, that the relationship of client and attorney did not exist when the agreement was made, contending that he had terminated the relationship about October 1, 1931. He insists that although the agreement bears date October 1, 1931, it was not signed until January, 1932, and then upon Grady's insistence that the relationship be resumed because of Hamilton's familiarity with the divorce proceeding, as to which there was still time to apply for leave to appeal to the Supreme court, and because of his familiarity with the Regan case. Grady, on the other hand, insists that the contract was presented to him about the date that it bears and was actually signed October 5. The master, evidently placing greater credence in Hamilton's testimony, sustained his contention as to the date of the signing of the contract and found that the relationship had in the interim been severed. The testimony of both parties indicates that the preservation of the relationship of client and attorney was the impelling motive for the execution of the agreement. Hamilton had conducted the divorce suit both in the trial court and in the Appellate court, and it was his familiarity with the case which undoubtedly prompted Grady to desire his continuance with the case for the preparation of a petition for rehearing in the Appellate court and a petition for leave to appeal to the Supreme court. Disregarding Grady's testimony that he continued with Hamilton because of his threat to injure him in the Regan case, it was undoubtedly because of Hamilton's familiarity with the divorce proceeding that he was able to exert "pressure," as he says, to secure

making any agreement with his client, the attorney was to disclose all information which might affect the client's decision as to the contract. Proffitt v. Anderson, 178 Ill. App. 633; Robinson v. Sharp, 201 Ill. 86. In conformity with this doctrine it was incumbent upon Hamilton to furnish the detailed facts and circumstances upon which the substantial fee which he claimed was provided. Hamilton takes the position, however, that the relationship of client and attorney did not exist when the agreement was made, contending that he had terminated the relationship about October 1, 1931. He insists that although the agreement bears date October 1, 1931, it was not signed until January, 1932, and then upon Grady's insistence that the relationship be resumed because of Hamilton's familiarity with the divorce proceedings, as to which there was still time to apply for leave to appeal to the Supreme Court, and because of his familiarity with the Hegan case. Grady, on the other hand, insists that the contract was presented to him about the date that it bears and was actually signed October 2. The master, evidently placing greater credence in Hamilton's testimony, sustained his contention as to the date of the signing of the contract and found that the relationship had in the interim been severed. The testimony of both parties indicates that the preservation of the relationship of client and attorney was the impelling motive for the execution of the agreement. Hamilton had conducted the divorce suit both in the trial court and in the appellate court, and it was his familiarity with the case which undoubtedly prompted Grady to desire his continuance with the case for the preparation of a petition for rehearing in the appellate court and a petition for leave to appeal to the Supreme Court. Disregarding Grady's testimony that he continued with Hamilton because of his threat to injure him in the Hegan case, it was undoubtedly because of Hamilton's familiarity with the divorce proceedings that he was able to exert "pressure," as he says, to secure

Grady's signature to the contract. These considerations evidently did not enter into the master's recommendations, but they are of controlling importance, and under the consistent ruling in this and other states, the law will not lend its support to an agreement procured under such circumstances.

Accordingly, we are of opinion that upon the record presented the agreement is not susceptible of enforcement. We do not pass upon the question whether Hamilton is entitled to additional fees or the amount thereof, but upon further hearing it will be incumbent upon him to adduce competent evidence as to the amount of the services that he claims and the extent thereof, so that the chancellor may determine whether he is entitled to additional compensation and the amount, if any, to be awarded to him. His admission that he had never given Grady any statement or information, and his failure to furnish detailed proof of the character and extent of his services, make it impossible for us to determine whether he is entitled to additional fees or the extent thereof, and the opportunity to make such showing will be presented to him upon further hearing.

Some dispute arises between the parties as to the question of the master's costs and expenses. This matter can be readily ascertained by the chancellor from facts to be presented to him and is left for further determination of the court.

The decree of the Circuit court is accordingly reversed and the cause remanded with directions to grant the relief prayed by the counterclaim and to afford plaintiff an opportunity to proceed further, if he so desires, upon the question of such fair and reasonable attorney's fees as he may be able to establish by competent evidence.

DECREE REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS.

Grady's signature to the contract. These could be shown conclusively did not enter into the master's recommendations, but they are of controlling importance, and under the contract ruling in this and other cases, the law will not lend its support to an agreement procured under such circumstances.

Accordingly, we are of opinion that upon the record presented the agreement is not susceptible of enforcement. We do not pass upon the question whether Hamilton is entitled to additional fees or the amount thereof, but upon further hearing it will be incumbent upon him to adduce competent evidence as to the amount of the services that he claims and the extent thereof, so that the chancellor may determine whether he is entitled to additional compensation and the amount, if any, to be awarded to him. His admission that he had never given Grady any statement or information, and his failure to furnish detailed proof of the character and extent of his services, make it impossible for us to determine whether he is entitled to additional fees or the extent thereof, and the opportunity to make such showing will be presented to him upon further hearing.

Some dispute arises between the parties as to the question of the master's costs and expenses. This matter can be readily ascertained by the chancellor from facts to be presented to him and is left for further determination of the court.

The decree of the Circuit court is accordingly reversed and the cause remanded with directions to grant the relief prayed by the complainant and to afford plaintiff an opportunity to proceed further, and if he so desires, upon the question of such fair and reasonable attorney's fees as he may be able to establish by competent evidence.

DECREE REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS



41906

ROBERT L. HASSENAUER, a minor,  
by LEO J. HASSENAUER, his father  
and next friend,  
Appellee,  
v.  
F. W. WOOLWORTH CO., a corporation,  
Appellant.

47  
APPEAL FROM MUNICIPAL  
COURT OF EVANSTON, COOK  
COUNTY.

314 I.A. 569

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Robert L. Hassenauer, a minor, by his father and next friend, brought suit against F. W. Woolworth Company for false imprisonment by defendant's agents and employees who are alleged to have been acting within the scope of their authority and without any right or provocation. Trial by jury resulted in a verdict and judgment for plaintiff in the sum of \$250, from which defendant appeals.

The essential facts disclose that Robert Hassenauer, fourteen years of age, entered defendant's store at 18 North State street, Chicago, in the early afternoon of October 22, 1940, together with two companions, Don and Robert Murphy. They bought two donkey pins in the store, and after making other purchases, started to walk out. They were accosted by Harold Brown, the floorwalker, and William J. Korn, floor supervisor, who accompanied Brown. Plaintiff testified that Robert Murphy was stopped first and then two men "grabbed" the boys; one man had Robert Murphy by the arm and the other had Don and the plaintiff. They were taken downstairs through the store and cafeteria, to a room marked "For Employees Only," a distance of several hundred feet. The store was fairly crowded with customers at the time. On the way down plaintiff asked one of the men, "What is wrong?" and the man replied, "You will find out." According to plaintiff's testimony, when they reached the room in the basement to which they had been taken, the boys were told to empty

ROBERT L. HASSENMAN, a minor,  
his father,  
and next friend,

Plaintiff,

v.

F. W. WOOLWORTH CO., a corporation,  
Defendant.

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ALL AD FROM MUNICIPAL

COURT OF WASHINGTON, D.C.

COUNTY

111 A 588

their pockets. One of the men searched Robert Murphy, but did not place his hands on plaintiff's person or clothes. Shortly thereafter one of the men left the room for several minutes, then came back, told the boys to "grab" their stuff and come upstairs. On the way up the boys walked in front and the men followed them. While the boys were still in the basement plaintiff heard one of the men say, "Why don't you go upstairs and ask the lady if she sold the pins?" Reaching the main floor, the boys walked to a counter with Brown and Korn, and there one of the men asked the salesgirls if they had sold pins to the boys. One of them replied that she had done so. Thereupon the boys were released, and as they were walking out of the store one of the men said, "I hope there are no hard feelings." About fifteen minutes elapsed between the time they were apprehended and released.

The complaint alleged "That the defendant, by certain of its servants, then and there engaged in their master's business and acting within the scope of their authority as such servants, with force and arms, and without any right or provocation, wantonly and wilfully laid hold of the plaintiff and then and there compelled plaintiff to accompany them through its said store and down certain stairs and along and through certain parts of the said store and into a certain room \*\*\* and in plain view of divers customers and employees and other persons, and then and there so kept and imprisoned the said plaintiff, \*\*\* without any reasonable or probable cause whatsoever, for a long space of time, \*\*\* contrary to the laws of the State of Illinois and against the will of the plaintiff."

It is urged by defendant that under the foregoing allegations of the complaint plaintiff was required to prove (1) that he was restrained or detained against his will; (2) that such restraint and detention was willful and wanton; and (3) that the restraint or detention was without any reasonable or probable cause;

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and defendant's counsel argue that since the evidence fails to disclose that defendant's employees detained plaintiff in such a manner as to show that their actions were conceived in a spirit of mischief and in utter indifference to consequences, and therefore willful and wanton, the judgment should be reversed.

It is not denied that defendant's agents were acting within the scope of their authority, and the fact that they were doing their duty does not excuse or justify the detention if it was unlawful. One of defendant's salesladies having admitted selling merchandise to plaintiff, the jury was fully justified in finding that the detention was unwarranted. The courts in this and other states, as well as textbook writers, have consistently enunciated the rule that prima facie any restraint put by fear or force upon the actions of another is unlawful and constitutes a false imprisonment, unless a showing of justification makes it a true or legal imprisonment, and that false imprisonment is necessarily a wrongful interference with the personal liberty of an individual. In Comer v. Knowles, 17 Kan. 436, a frequently cited case, the court said that false imprisonment is necessarily a wrongful interference with the personal liberty of an individual; that the "wrong may be committed by words alone, or by acts alone, or by both, and by merely operating on the will of the individual, \*\*\*. It is not necessary that the individual be confined within a prison, or within walls; or that he be assaulted, or even touched. It is not necessary that there should be any injury done to the individual's person, or to his character, or reputation. Nor is it necessary that the wrongful act be committed with malice, or ill-will, or even with the slightest wrongful intention. \*\*\* All that is necessary is, that the individual be restrained of his liberty without any sufficient legal cause therefor, and by words or acts which he fears to disregard." (Italics ours.) This statement of the law was approved in Meints v. Huntington, 276 Fed. 245, and adopted in sub-

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stance as a definition of false imprisonment by the American Law Institute in its Restatement of the Law of Torts, vol. 1, p. 66, sec. 35.

There is also abundant authority holding that actual malice is not a necessary element of false imprisonment and need neither be alleged nor proved. Shanley v. Wells, 71 Ill. 78; Oliver v. Kessler, 95 S. W. (2d) 1226; 22 Am. Jur., False Imprisonment, sec. 4, p. 357.

Nor would the fact that the complaint had charged the false imprisonment to have been willful and wanton, without proof of actual malice, preclude plaintiff from recovery. In Devereaux v. Belsey, 7 Fed. Supp. 991, the use of the word "maliciously" in the charge of false imprisonment was held to be surplusage, and our courts have said that whether the injury was inflicted willfully or wantonly is a question of fact to be determined by the jury and depends upon the circumstances of each case. Streeter v. Humrichouse, 357 Ill. 234.

Although malice may be the gist of some actions such as malicious prosecution, it is not necessary for plaintiff in an action for false imprisonment to prove that malice actually existed, since malice may be implied in law or inferred from a want of probable cause in an action for false imprisonment.

The rule in this state is well set forth in Schramko v. Boston Store, 243 Ill. App. 251. Plaintiff, a minor, who was charged with stealing jewelry while in a department store, apprehended and later released, there sued to recover damages for alleged false arrest and imprisonment. In discussing the law applicable to the facts, the court stated the rule as follows: "False imprisonment is 'any unlawful exercise or show of force, by which a person is compelled to remain where he does not wish to remain, or to go where he does not wish to go.'" Durgin v. Cohen, 168 Minn. 77, 209 N. W. 532. False imprisonment is 'the unlawful

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It would be true that the complaint had charged the false imprisonment to have been willful and wanton, without proof of actual malice, preclude plaintiff from recovery. In Johnson v. Helsey, 7 Fed. App. 991, the use of the word "maliciously" in the charge of false imprisonment was held to be surplusage, and our courts have said that whether the injury was inflicted willfully or wantonly is a question of fact to be determined by the jury and depends upon the circumstances of each case. Stewart v. Hamblen, 357 Ill. 234.

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Boston Store, 243 Ill. App. 231. Plaintiff, a minor, who was charged with stealing jewelry while in a department store, was handed and later released, there sued to recover damages for alleged false arrest and imprisonment. In discussing the law applicable to the facts, the court stated the rule as follows: "False imprisonment is 'any unlawful exercise or show of force, by which a person is compelled to remain where he does not wish to remain, or to go where he does not wish to go.' Smith v. Jones, 108 Mass. 77, 209 N. E. 532. False imprisonment is 'the unlawful



restraint by one person of the physical liberty of another. The true test seems to be, not the extent of the restraint, but the lawfulness thereof.' Weiler v. Herzfeld-Phillipson Co., 89 Wis. 554, 208 N. W. 599."

Under the foregoing decisions it is of no importance that the actions of defendant's agents were not conceived in a spirit of mischief or in utter indifference to consequences. The undisputed facts indicate that plaintiff was unlawfully restrained, without any reasonable or probable cause. The failure of defendant's agents Brown and Korn to investigate the circumstances before apprehending plaintiff are similar to the facts in Lindquist v. Friedman's Inc., 285 Ill. App. 71, where the court, in affirming a judgment for damages in a false imprisonment charge, called attention to the fact that if Friedman or his employees had made even a slight investigation, he could have ascertained without difficulty that plaintiffs were innocent and said that "Failure to investigate, resulting in unlawful imprisonment, connotes malice. Hirsch v. Feeney, 83 Ill. 548."

It is also urged that the court erred in giving certain instructions on behalf of plaintiff and refusing to give others requested by defendant. Plaintiff submitted nine instructions, of which only five were allowed. Opposed to these, defendant submitted eighteen, of which the court allowed fourteen. The instructions offered by defendant and allowed by the court covered every phase of the case and sufficiently charged the jury as to the law applicable to the facts. Although the instructions given on behalf of plaintiff and those of defendant refused by the court are criticized by counsel, scant authority is cited to support the argument. After an examination of the instructions as a whole we think they properly charged the jury as to the law and are free from the criticism made.

The remaining ground urged for reversal is that the damages

restrained by one person or an official lip of another. The true test seems to be, not the content of the statement, but the lawfulness thereof. Miller v. Harris, 208 N. W. 2d 254, 208 N. W. 2d 255.

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are excessive. The amount of damages is largely a question for the jury and should not be interfered with unless it appears to have been the result of prejudice, passion, or disproportionate to the damages suffered. Considering the fact that plaintiff was obliged to retain counsel to institute suit and defend the judgment in this court, we do not think that the verdict can well be subjected to the charge that it was excessive.

The case was fairly tried. Since we find no convincing reason for reversal, the judgment of the Municipal court is affirmed.

JUDGMENT AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

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JUDGMENT AFFIRMED.

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42023

NATIONAL BANK OF DETROIT,  
a banking corporation,  
Appellant,

v.

DAVID SACHS,

Appellee.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

314 I.A. 570<sup>1</sup>

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

National Bank of Detroit brought suit on a check dated September 11, 1940, drawn by defendant, David Sachs, on the Central National Bank of Chicago and payable to the order of Sam Bloom for \$1,169.15. Bloom had indorsed the check without restriction and deposited it in his account with the Detroit bank on the following day and received credit therefor. This, added to previous deposits by Bloom, gave him a total credit balance of \$3,813.20. September 13 the bank honored two of Bloom's checks, one of \$138.02 and the other for \$2,600, thus reducing the credit balance to \$1,075.18. September 14 Bloom drew a check of \$765 on his account, which was honored, reducing the credit balance to \$310.18. September 17 Sachs' check was returned with the notation, "PAYMENT STOPPED." The bank claims that by honoring these checks it paid money for Sachs' check of \$1,169.15 and is therefore entitled to recover the difference between the amount of the Sachs' check and the balance of \$310.18 left in the account, plus protest fees of \$2.60, or an aggregate of \$865.99, together with costs. The court heard the cause without a jury and entered a finding and judgment for defendant, from which the bank appeals.

The parties stipulated on trial that defendant has a set-off against Sam Bloom in the sum of \$3,380.10, and both counsel conceded that plaintiff's right to recovery depended on whether or not it was a holder in due course for value. Defendant

APPEAL FROM MUNICIPAL COURT  
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MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

National Bank of Detroit brought suit on a check dated September 11, 1940, drawn by defendant, David Sachs, on the Central National Bank of Chicago and payable to the order of Sam Bloom for \$1,100.15. Bloom had indorsed the check without restriction and deposited it in his account with the Detroit bank on the following day and received credit therefor. This added to previous deposits by Bloom, gave him a total credit balance of \$3,813.20. September 13 the bank honored two of Bloom's checks, one of \$138.02 and the other for \$2,600, thus reducing the credit balance to \$1,075.18. September 14 Bloom drew a check of \$265 on his account, which was honored, reducing the credit balance to \$810.18. September 17 Sachs' check was returned with the notation, "PAYMENT STOPPED." The bank claims that by honoring these checks it paid money for Sachs' check of \$1,100.15 and is therefore entitled to recover the difference between the amount of the Sachs' check and the balance of \$810.18 left in the account, plus protest fees of \$2.60, or an aggregate of \$865.99, together with costs. The court heard the cause without a jury and entered a finding and judgment for defendant, from which the bank appeals.

The parties stipulated on trial that defendant has a set-off against Sam Bloom in the sum of \$2,380.10, and both counsel conceded that plaintiff's right to recovery depended on whether or not it was a holder in due course for value. Defendant

takes the position that the bank was not a holder in due course but merely an agent for collection, and that since he had a good defense by way of set-off against Bloom in excess of the face value of the check, he also had a good defense to the bank's suit. This argument is predicated upon the proposition that the deposit book and slip constitute a contract between the parties and determine their relationship. Two Illinois cases and one decision in Michigan are relied on for support of this contention. Home Bank & Trust Co. v. Bogorad, 242 Ill. App. 16; People v. Michigan Trust Co., 242 Ill. App. 579; Davidow v. Bank of Detroit, 254 Mich. 447, 236 N. W. 828. The question presented in all these cases was whether under the agreement between the bank and the depositor appearing in the pass book and deposit slip, title to the paper remained in the depositor or passed to the bank. In the Bogorad case the depositor's account with the bank was subject to an express agreement "that all checks \*\*\* deposited with and received by this bank for collection or credit \*\*\* are delivered to and received by this bank expressly and only upon condition that this bank acts only as your agent for your account and convenience, and assumes no responsibility whatever \*\*\*." In pursuance of this provision the court held that the bank was not the owner of the check, because under the agreement the bank was expressly designated as agent and therefore could not be the owner or principal. In reaching this conclusion the court said that it would be utterly inconsistent that the bank should accept checks for deposit on an express understanding that it does so as agent only, and at the same time assert ownership thereto against the maker, and that "It cannot occupy both positions in the same transaction. \*\*\* The logical conclusion therefrom is that the bank's relationship is that of agent, and, therefore, it did not obtain title to the check." The decision is clearly confined to the agency provision of the agreement between the par-





ties, and the following excerpt from the opinion indicates that the court did not recognize that rule as applying to cases where no agency exists: "An extensive line of authorities on the effect of the deposit of indorsed paper to pass title to the bank, under varying circumstances, may be found in an annotation in 11 A. L. R. 1060. It is there said that the majority of cases hold that where there is no definite understanding between the depositor and the bank as to the ownership of the paper, and the paper is indorsed without restriction and deposited to the depositor's account and he is given credit therefor with the right to draw thereon, title passes to the bank. Decisions in this state are in line with those authorities."

The second case relied on by defendant, People v. Michigan Avenue Trust Co., supra, is to the same effect. The pass book there issued provided that "Checks on this bank will be credited conditionally. If not found good at close of business, they will be charged back to depositors, and the latter notified of the fact. \*\*\* This bank in receiving checks or drafts on deposit or for collection, acts only as your agent, and beyond carefulness in selecting agents at other points, and in forwarding to them, assumes no responsibility." The court pointed out that the authorities are not harmonious upon the general question whether title to checks deposited by a customer of a bank to his account passes to the bank by an unrestricted indorsement of the paper deposited, referred to collected cases appearing in an exhaustive note in 11 A. L. R. 1043, and said that under the majority view, as recognized in Illinois in numerous cases cited in the opinion, where a deposit is made and immediate credit is given to the depositor, subject to the right on the part of the bank to charge back any check or draft that is not paid, title to the paper passes to the bank, and the relation thereby created between the bank and the depositor

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is that of debtor and creditor, in the absence of any agreement to the contrary. However, in view of the agreement contained in the pass book, it held that the bank merely became the depositor's agent and not the holder of the paper.

In the third case, Davidow v. Bank of Detroit, supra, the deposit book provided that, "This bank in receiving checks, drafts and notes or other items on deposit or for collection acts as your agent only." The Michigan court held that by reason of this provision the note remained the property of the plaintiff in that case. There is complete uniformity in these decisions, the conclusions in each instance being predicated upon an express agreement, between the bank and the depositor, which designated the bank as agent, and obviously under such a provision the bank could not well obtain title to the check.

We find cited in plaintiff's brief American Trust and Savings Bank v. Gueder & Paeschke Mfg. Co., 150 Ill. 336, wherein the payee of a check indorsed it to his banker "for deposit," to be placed to the depositor's credit, and mailed it to his bank. Upon receipt of the check the bank gave the depositor credit on account for the face value of the check, and after stamping on the check "For collection and return" the bank forwarded it to the drawer for payment. Under these circumstances it was held that the deposit of the check was, in legal effect, a negotiation of the same so as to vest the legal title in the bank, with the right on its part to charge it back to the depositor in case it was not paid on presentment, and that the credit given the depositor in its account was a sufficient consideration for the assignment.

In the case at bar defendant relies on the provisions of the deposit slip and pass book which both provide (1) that "Credits for all items are subject to final payment in cash or solvent credits"; (2) that "All items transmitted for collection to any

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We find cited in plaintiff's brief American Bank and Savings Bank v. Gueber & Paschke Mfg. Co., 150 Ill. 236, wherein the payee of a check indorsed it to his banker "for deposit," to be placed to the depositor's credit, and mailed it to his bank. Upon receipt of the check the bank gave the depositor credit on account for the face value of the check, and after stamping on the check "For collection and return" the bank forwarded it to the drawer for payment. Under these circumstances it was held that the deposit of the check was, in legal effect, a negotiation of the same so as to vest the legal title in the bank, with the right on its part to charge it back to the depositor in case it was not paid on presentation, and that the credit given the depositor in its account was a sufficient consideration for the assignment. In the case at bar defendant relies on the provisions of the deposit slip and pass book which both provide (1) that "Credits for all items are subject to final payment in cash or solvent credits"; (2) that "All items transmitted for collection to any

Federal Reserve Bank shall be governed by the rules and regulations of such bank and of the Federal Reserve Board"; and (3) that "Any item drawn on or payable at this bank may be charged back to the depositor at or before the end of the business day next following the day of deposit in the event the item is found not good or payable for any reason." None of these provisions is analogous to the agreements contained in the cases upon which defendant relies. Moreover, the agreement that credits for all items are subject to final payment in cash or solvent credits, and that any items may be charged back if not collected, is not inconsistent with ownership of the check, as defendant contends, especially after the money has been paid for the check and until it is charged back. When the money is thus paid for the paper, the bank becomes the owner thereof, and what is done thereafter does not change the relationship between the parties. These conclusions are supported by the statute of Michigan, where the transaction took place, and Michigan decisions interpreting the statute. Section 54 (par. 19.94) of the Negotiable Instruments Law (Michigan Statutes Annotated (1937), vol. 14) provides that a holder in due course is one who has taken the instrument under the following conditions: (1) that it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; and (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument, or defect in the title of the person negotiating it. Section 28 (par. 19.68) of the act defines a holder for value as follows: "Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time." (Italics ours.) Section 56 (par. 19.96) provides that "Where the transferee re-



ceives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him."

Upon trial plaintiff read the deposition of Joseph Wersching, an employee of the bank. He testified that the bank permitted Bloom to draw against Sachs' check, and the ledger sheet, which was received in evidence, so shows. When the check for \$1,169.15 was deposited, the balance in Sachs account was \$3,813.20, indicating that before deposit of the instrument, his balance was \$2,644.05. When plaintiff honored the two checks for \$138.02 and \$2,600, respectively, it necessarily paid on Sachs' check the difference between the balance of \$2,644.05 and \$2,738.02, or \$93.97. Subsequently, when it honored the last check for \$765 drawn against the account, it paid that much more on defendant's check. Accordingly, there seems to be little room for doubt that credit was given for the check on which this suit is brought. Several cases cited in plaintiff's brief support this conclusion. Drovers' National Bank v. Blue, 110 Mich. 31, 67 N. W. 1105; Warman v. First National Bank, 185 Ill. 60; City Deposit Bank v. Green, 130 Iowa 384, 106 N. W. 942. In the first of these decisions the court said that in order to prove itself a holder for value the bank must show that the credit was drawn upon or that the account was exhausted before the maturity of the note or before notice of the fraud. In the Warman case it was held that the bank must not only show that it credited the proceeds of the discounted note by way of deposit in favor of the payee and that the payee was not indebted to the bank, but it must also prove that the amount due on such deposit had not been withdrawn.

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for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time, and (sec. 3418) where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien. (Remington's Revised Statutes of Washington Annotated (1932), vol. V.) In Old National Bank v. Gibson, 105 Wash. 578, 179 Pac. 117, 6 A. L. R. 247, the bank received a check for collection and credited it to the depositor's account upon condition that it be charged back in case of dishonor. Subsequently it permitted the depositor to withdraw the amount of the check before learning of its dishonor. In discussing the relationship of the parties, the court cited the foregoing provisions of the Negotiable Instruments Act, and said that "according to the plain language of the statute, it [the bank], under the facts pleaded here, became a holder for value to the full amount for which the check was drawn. The statute above referred to expresses only what has been the law of negotiable paper since the time 'whereof the memory of man runneth not to the contrary.'"

The weight of authority supports plaintiff's contention that it is a holder in due course of Sachs' check up to the amount of the overdraft, and as such it should be allowed to recover from defendant the sum of \$865.99. Since nothing can be gained by retrial of the case, the order of the Municipal court is reversed and judgment is entered here in favor of plaintiff and against defendant for \$865.99 and costs.

ORDER REVERSED AND JUDGMENT  
HERE FOR PLAINTIFF.

Scanlan, P. J., and Sullivan, J., concur.

for the instrument, the holder is deemed a holder for value in respect to all parties who become such prior to that time, and (sec. 3418) where the holder has a lien on the instrument, arising either from contract or by application of law, he is deemed a holder for value to the extent of his lien. (Remington's Revised Statutes of Washington Annotated (1932), vol. V.) In Old National Bank v. Gibson, 105 Wash. 278, 179 Pac. 117, 6 A. 2d 247, the bank received a check for collection and credited it to the depositor's account upon condition that it be charged back in case of dishonor. Subsequently it permitted the depositor to withdraw the amount of the check before learning of its dishonor. In discussing the relationship of the parties, the court cited the foregoing provisions of the Negotiable Instruments Act, and said that "according to the plain language of the statute, it [the bank], under the facts pleaded here, became a holder for value to the full amount for which the check was drawn. The statute above referred to expresses only what has been the law of negotiable paper since the time 'whereof the memory of man runneth not to the contrary.'"

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ORDER IN REVERSAL AND JUDGMENT  
HERE FOR PLAINTIFF.

Scamman, F. J., and Sullivan, J., concur.

40999

FREDERICK B. THOMAS,  
Appellee.

v.

F. THOMAS MORRIS et al.,  
Defendants.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

SEPARATE APPEAL OF  
FRANK D. QUINN,  
Appellant.

314 I.A. 570<sup>2</sup>

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This proceeding is in the nature of an action for interpleader, in which Frederick B. Thomas filed a complaint wherein he sought a determination of his right and that of several other brokers to a commission on the sale of certain property and particularly to a fund of \$3,900, which the sellers had deposited with the Continental Illinois National Bank & Trust Company of Chicago to cover the amount admittedly due to the broker or brokers entitled to the commission on the sale. The complaint as amended names as parties defendant, F. Thomas Morris, Frank D. Quin and Abraham S. Nahin, who individually and severally claimed the commissions on the sale, the Northern Trust Company and William C. Freeman and Peter B. Carey, Trustees, as the owners or sellers of the property, and the Continental Illinois National Bank & Trust Company of Chicago, as escrowee of the deposit.

Defendant Quinn filed an answer alleging that he was the only broker entitled to the commission and he also filed a counterclaim asking that a judgment be entered in his favor as to the commission of \$3,900 deposited in escrow.

The cause was referred to a master in chancery, who found the issues in favor of plaintiff Thomas and defendant Morris and recommended that the fund held in escrow be divided equally between them after deducting certain costs and expenses and that

FREDERICK W. THOMAS  
Appellee

v.

F. THOMAS MORRIS et al.  
Defendants

SEPARATE APPEAL OF  
FRANK D. QUINN  
Appellant

NATIONAL TRUST COMPANY  
CHICAGO, ILL.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

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Defendant Quinn filed an answer alleging that he was the only broker entitled to the commission and he also filed a counterclaim asking that a judgment be entered in his favor as to the commission of \$3,900 deposited in escrow.

The cause was referred to a master in chancery, who found the issues in favor of plaintiff Thomas and defendant Morris and recommended that the fund held in escrow be divided equally between them after deducting certain costs and expenses and that

Thomas and Morris be paid the further sum of \$4,500 if Cuneo, the purchaser of the property in question, exercised an option given him to purchase an adjacent tract of land. The master overruled objections filed by defendants Quin and Morris to his amended report. The chancellor overruled the exceptions of defendants Quin and Morris to the master's amended report and entered a decree in accordance with the recommendations contained in said report.

Defendant Morris filed a notice of appeal from the decree but failed to complete same in this court. Defendant Nahin did not file a notice of appeal. Defendant Quin perfected a separate appeal, which is before us for consideration.

The findings of fact, conclusions and recommendations of the master in chancery pertinent to this appeal are as follows:

#### "FINDINGS OF FACT

"That on April 1, 1935, The Northern Trust Company as Trustee under trust agreement dated June 14, 1932, and known as Trust No. 9914, was the record owner of certain real estate in Libertyville, Lake County, Illinois, described as Parcel 'A' and Parcel 'B', in paragraph 1 of the Complaint filed herein by plaintiff, and that William C. Freeman and Peter B. Carey, Successor Trustees under agreement between Samuel Insull and Central Republic Bank and Trust Company, dated June 14, 1932, and known as Trust No. 14958, or their predecessor trustees under said agreement, were on said April 1st and until the sale of said real estate the beneficial owners thereof.

"That the plaintiff, FREDERICK B. THOMAS, and the defendants, F. THOMAS MORRIS, FRANK D. QUIN and ABRAHAM S. NAHIN, and each of them, were on April 1, 1935 and since that date, engaged in the business of real estate brokerage, and then held and now held certificates of registration as real estate brokers \*\*\*.

"That on or about June 25, 1937, the said The Northern Trust Company, as Trustee as aforesaid, and the said William C. Freeman and Peter B. Carey, Successor Trustees as aforesaid, entered into an agreement with John F. Cuneo for the sale of Parcel 'A' of said real estate for the sum of \$122,500, and for the additional consideration of \$7,500 granted said John F. Cuneo an option to purchase Parcel 'B' for the sum of \$150,000, which said agreement was thereafter consummated by the payment by said John F. Cuneo to said Trustees of the sum of \$130,000 for said Parcel 'A' and for said option.

"That the defendant, Frank D. Quin, made claim upon the defendants, The Northern Trust Company, Trustee as aforesaid,

Thomas and Morris to give the property in question, executed in and given to him to purchase an adjacent tract of land. The defendant overruled objections filed by defendants and Morris to his amended report. The chancellor overruled the objections of defendants and Morris to the master's report and the report was affirmed in accordance with the master's report. Defendant Morris filed a notice of appeal from the decree but failed to complete same in this court. Defendant also did not file a notice of appeal. Defendant also requested a separate appeal, which is before us for consideration.

The findings of fact, conclusions and recommendations of the master in chambers pertinent to this appeal are as follows:

# "FINDINGS OF FACT"

"That on April 1, 1935, the North Trust Company as Trustee under trust agreement dated June 14, 1932, and known as Trust No. 9914, was the record owner of certain real estate in Libertyville, Lake County, Illinois, described as Parcel 'A' in paragraph 1 of the Complaint filed herein by plaintiff, and that William C. Freeman and Peter B. Carey, Successor Trustees under agreement between Samuel Insull and Central Republic Bank and Trust Company, dated June 14, 1932, and known as Trust No. 14978, or their predecessor trustees under said agreement, were on said April 1st until the sale of said real estate the beneficial owners thereof.

"That the plaintiff, THOMAS MORRIS, and the defendants, F. THOMAS MORRIS, THOMAS D. GUNN and THOMAS E. GUNN, each of them, were on April 1, 1935 and since that date, engaged in the business of real estate brokerage, and then sold and now hold certificates of registration as real estate brokers."

"That on or about June 23, 1935, the said the Northern Trust Company, as Trustee as aforesaid, and the said William C. Freeman and Peter B. Carey, Successor Trustees as aforesaid, entered into an agreement with John F. Gunn for the sale of Parcel 'A' of said real estate for the sum of \$125,000, and for the additional consideration of \$7,500 granted said John F. Gunn an option to purchase Parcel 'A' for the sum of \$150,000, which said agreement was thereafter consummated by the payment by said John F. Gunn to said Trustee of the sum of \$150,000 for said Parcel 'A' and for said option."

"That the defendant, THOMAS D. GUNN, made claim upon the defendants, The Northern Trust Company, Trustee as aforesaid,

and William C. Freeman and Peter B. Carey, Successor Trustees, as aforesaid, for a share of any brokerage commission payable by them by reason of said sale; that the defendant F. Thomas Morris also made claim upon said defendants, The Northern Trust Company, Trustee as aforesaid, and William C. Freeman and Peter B. Carey, Successor Trustees, as aforesaid, that he was entitled to any brokerage commission payable by them by reason of said sale; and that the defendant Abraham S. Nahin, also made claim upon the defendant Peter Carey, Trustee, and upon one John Gallagher, Agent, as broker through Frank D. Quin, agent, for full commissions on said sale.

"That the amount of commission payable on said sale by the Trustees for the owners of said premises is 3% of said sum of \$130,000 paid for said Parcel 'A', or the sum of \$3,900, and the additional sum of \$4,500 in the event that the option to purchase said Parcel 'B' for the sum of \$150,000 shall be exercised pursuant to the terms of said agreement of sale.

"That the commission of \$3,900 for the sale of said Parcel 'A' was deposited with the Continental Illinois National Bank and Trust Company of Chicago, as Escrow Agent, by William C. Freeman and Peter B. Carey, Successor Trustees as aforesaid, under the terms of an Escrow Agreement dated September 16, 1937 signed by said Trustees as Depositors, consented and agreed to by Frank D. Quin and Frederick B. Thomas, and receipt of said sum and agreement to hold and dispose of same in accordance with the provisions of said agreement made by said Continental Illinois National Bank and Trust Company of Chicago.

"That said Escrow Agreement provided, among other things: 'The Escrow Agent is authorized to pay said sum of Three Thousand Nine Hundred Dollars (\$3,900) upon the joint written order of Frederick B. Thomas, of 743 Elm Street, Winnetka, Illinois, F. Thomas Morris, of 111 West Washington Street, Chicago, Illinois, Frank D. Quin of 3816 North Ridgway Street, Chicago, Illinois, and the Depositors or their successors in trust, or pursuant to an order of Court as hereinafter specified.'

"That the defendant Quin signed the escrow on the condition and with the understanding that it would not be binding upon him until or unless said escrow was signed by the plaintiff Thomas and defendant Morris, and the defendant Morris never executed or signed said escrow.

"That the defendant F. Thomas Morris, was not a party to the escrow of the commission on the sale with the defendant, Continental Illinois National Bank and Trust Company, as escrowee.

"That the defendant, F. Thomas Morris, on or shortly after April 1, 1935 suggested John Cuneo to Frederick B. Thomas as a prospect for the purchase of farm property north and west of Chicago; that Thomas and Morris agreed upon an equal division of the commission in the event of a sale of the property to Cuneo; that the reason for Morris not appearing in the deal was that Morris was trying to sell a large Chicago property to Cuneo; that Frederick B. Thomas is located in Winnetka, Illinois, and specializes in the sale of real estate north and west of Chicago.

"That on April 11, 1935, Frederick B. Thomas submitted to Cuneo a list of six (6) properties for the purpose of determining the kind of property Cuneo wanted; that he talked to Cuneo on the

[illegible][illegible]

"That the commission of \$34800 for the sale of said Patent 'A' was deposited with the Continental Illinois National Bank and Trust Company of Chicago, as escrow agent, by William B. Thomas and Peter B. Carey, Successors, pursuant to agreement, and the terms of an escrow agreement dated and made on the 10th day of March, 1917, signed by said Thomas and Carey, and by said Thomas and Frederick B. Thomas, and a copy of said agreement to hold and dispose of same in accordance with the provisions of said agreement made by said Continental Illinois National Bank and Trust Company of Chicago.

"The said Escrow Agreement provided, among other things: The Escrow Agent is authorized to pay out of the Three Thousand Nine Hundred Dollars (\$3,900) upon the joint written order of Frederick B. Thomas, of 445 Elm Street, Winnetka, Illinois, F. Thomas Morris, of 111 West Washington Street, Chicago, Illinois, Frank D. Ginn of 3810 North Ridgway Street, Chicago, Illinois, and the Depositors or their successors in trust, or payment to an order of Court as hereinafter specified."

"That the defendant then signed the escrow and with the understanding that it would not be binding upon him until or unless said escrow was signed by the plaintiff. There and defendant Morris, and the defendant herein were executed or signed said escrow."

Continental Illinois National Bank and Trust Company, as executor, the executor of the commission on the sale with the defendant, Thomas Morris, was not a party to

"That the Defendant, E. Thomas Morris, did not directly or indirectly suggest John Gunn to Frederick D. Thomas as a prospect for the purchase of farm property north and west of Chicago; that Thomas and Morris agreed upon an equal division of the commission in the event of a sale of the property to Gunn; that the reason for Morris not appearing in the deed was that Morris was trying to sell a large Chicago property to Gunn; that Frederick D. Thomas is located in Linneton, Illinois, and specializes in the sale of real estate north and west of Chicago."

"That on April 11, 1935, Frederick E. Thomas advised to Gurnee a list of six (6) properties for the purpose of determining the kind of property Gurnee wanted; that he failed to advise on this



'phone May 4, 1935 and submitted the so-called Insull Farm, which includes Parcels 'A' and 'B' herein referred to, and confirmed the conversation and the submission of such property by letter on the same date; that on or about June 1st or 2nd, 1935, Mr. Thomas took Mr. and Mrs. John Cuneo to examine the Insull Farm, and again on August 21st, took Mr. Cuneo to make another inspection of the place; that on November 1, 1935 Thomas wrote another letter to Cuneo describing the soil conditions on the Insull Farm, and recommending them and recommending the farm; that in the summer of 1936 Thomas advised Morris of the efforts of another broker named Quin to sell the Insull property to Cuneo; and that on or about April 10, 1937 Thomas interviewed John B. Gallagher, one of the agents in charge of the Insull property and told him he was working on Cuneo as a prospective purchaser; that from the time Thomas first interviewed Cuneo until May 1, 1937, he 'phoned Cuneo at intervals concerning the deal.

"That on April 25, 1937 Thomas had Morris come to his office and Morris and Thomas went out and inspected a farm called the 'Schraeger Farm', which Morris on April 27, 1937 submitted to Mr. Cuneo; that on April 27, 1937 Morris first approached Cuneo directly to interest him in the purchase of the Insull Farm in a letter addressed to Cuneo by Morris on that date, and that he first interviewed Cuneo personally concerning the Insull Farm on May 5.

"That on May 15, 1937 Thomas visited Morris at Morris' office in Chicago and inquired about Morris' progress in the Cuneo deal.

"That Frank D. Quin, defendant, first submitted the property to Cuneo in the Fall of 1935, subsequent to submission of the property by Thomas, and while Thomas was still negotiating with Cuneo; that from and after Quin's submission of the Insull Farm to Cuneo, Quin continued to see Cuneo from time to time with reference to the purchase of the property and took Mr. and Mrs. Cuneo out to see it; that Abraham S. Nahin furnished a car which Quin used to visit the property with Nahin, and Nahin also furnished some maps of the property used by Quin.

"That Cuneo continued to be interested in the purchase of the property from the time it was first shown to him by Thomas on May 4, 1935 until its purchase.

"That the parties to the sale were brought together at a conference on June 1, 1937 arranged by F. Thomas Morris, and substantially agreed orally on the terms of the sale at said conference, and that the said F. Thomas Morris was present.

#### "CONCLUSIONS

"That the joint efforts of FREDERICK B. THOMAS and F. THOMAS MORRIS were the procuring and proximate cause of the sale of the property to Cuneo; Thomas had the property listed for sale and Morris did not; Thomas showed it to Cuneo in the first instance and kept his interest alive in the deal; F. Thomas Morris brought the negotiations to a successful conclusion.

"That the defendant, F. THOMAS MORRIS, while not a party to the escrow of the commission on the sale with the escrowee, has recognized the validity of the same by asking herein for a decree against said fund so deposited in escrow.

"That F. THOMAS MORRIS and FREDERICK B. THOMAS are

phone May 4, 1937 and submitted the same to the Insull Farm, which included parcels A1 and A2. Morris wrote to and confirmed the conversation and the submission of such property by letter on the same date; that on or about June 1st or 2nd, 1937, Mr. Thomas took Mr. and Mrs. John Gurneo to examine the Insull Farm, and again on August 24th, took Mr. Gurneo to make another inspection of the place; that on November 1, 1937, Thomas wrote another letter to Gurneo, enclosing the said conditions on the Insull Farm, and recommending that Gurneo make a decision on the matter of 1936 Thomas advised Morris of the farm; that in the summer of 1936 Thomas advised Morris of the efforts of another broker named Gurneo to sell the Insull property to Gurneo; and that on or about April 10, 1937, Thomas delivered to Gurneo, one of the agents in charge of the Insull Farm, property and told him he was working on Gurneo as a prospective purchaser; that from the time Thomas first delivered Gurneo until May 1, 1937, he phoned Gurneo at intervals concerning the deal.

"That on April 25, 1937, Thomas and Morris came to his office and Morris and Thomas went out and inspected a farm called the 'Scheraga Farm', which Morris on April 25, 1937, submitted to Mr. Gurneo; that on April 27, 1937, Morris first approached Gurneo directly to interest him in the purchase of the Insull Farm in a letter addressed to Gurneo by Morris on that date, and that he first interviewed Gurneo personally concerning the Insull Farm on May 2.

"That on May 15, 1937, Thomas visited Morris at Morris' office in Chicago and inquired about Morris' progress in the Gurneo deal.

"That Frank D. Quinn, defendant, first submitted the property to Gurneo in the fall of 1936, subsequent to submission of the property by Thomas, and while Thomas was still negotiating with Gurneo; that from and after Quinn's submission of the Insull Farm to Gurneo, Quinn continued to see Gurneo from time to time with reference to the purchase of the property and took Mr. and Mrs. Gurneo out to see it; that Abraham S. Mahin furnished a car which Gurneo used to visit the property with Mahin, and Mahin also furnished some maps of the property used by Quinn.

"That Gurneo continued to be interested in the purchase of the property from the time it was first shown to him by Thomas on May 4, 1937 until its purchase.

"That the parties to the sale were brought together at a conference on June 1, 1937 arranged by F. Thomas Morris, and substantially agreed orally on the terms of the sale at said conference, and that the said F. Thomas Morris was present.

**"CONCLUSIONS"**

"That the joint efforts of THOMAS MORRIS, THOMAS and F. THOMAS MORRIS were the procuring and procuring cause of the sale of the property to Gurneo; Thomas had the property listed for sale and Morris did not; Thomas showed it to Gurneo in the first instance and kept his interest alive in the deal; F. Thomas Morris brought the negotiations to a successful conclusion.

"That the defendant F. THOMAS MORRIS, while not a party to the escrow of the commission on the sale with the escrow, has recognized the validity of the same by signing thereon for a decree against said fund so deposited in escrow.

"That F. THOMAS MORRIS and FREDERICK B. THOMAS are

entitled to the remainder of said fund in escrow, after deducting the sum of ONE HUNDRED FIVE DOLLARS (\$105.00) for escrowee's costs and expenses as aforesaid, to be divided between them in equal proportions; and that their respective shares of the costs of this suit, including stenographer's and Master's fees as hereinafter recommended should be deducted from each of their shares of said escrow fund before payment to them of the amounts then due them therefrom; and that if the option to purchase Parcel 'B' herein-after referred to is exercised by the said JOHN F. CUNEO the commission thereon will be due to the said F. THOMAS MORRIS and FREDERICK B. THOMAS, to be divided between them in equal proportions.

"That Quin's claim for a commission from the sellers on the theory that the sellers were unfair to him in selling through Morris to Cuneo at a lower price than they quoted to Quin is not tenable because Quin is not the procuring cause of the sale."

"The defendant Quin is not bound by the terms of the escrow because he signed the said agreement on the condition and with the understanding that it would not be binding upon him until and unless the plaintiff Thomas and defendant Morris signed said escrow, and said escrow was not signed by the defendant Morris. The defendant Quin, however, is bound by the terms of the escrow because he has recognized the validity of the same by asking here for a decree against the funds so deposited in escrow."

#### "RECOMMENDATIONS

"That a decree be entered herein directing the said CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY, escrowee, to deduct and retain for itself as its fees and expenses and costs as said escrowee, the sum of ONE HUNDRED FIVE DOLLARS from said escrow fund of THIRTY-NINE HUNDRED DOLLARS; that the decree provide that in the event the option to purchase said Parcel 'B' herein referred to is exercised by the said JOHN F. CUNEO, that the said F. Thomas Morris and FREDERICK B. THOMAS are the brokers entitled to share in said commission equally."

"That the prayers of the said Frank D. Quin and Robert S. Nahin for commission out of said escrow fund on the sale of Parcel 'A', or commission on the sale of Parcel 'B' should the option of John F. Cuneo to purchase be exercised, be denied. \*\*\*\*"

As heretofore stated the decree was entered in accordance with the recommendations of the master that the commission presently due and on deposit with the escrowee be paid in equal share to the plaintiff Thomas and the defendant Morris after deducting fees, costs and charges and that in the event that Cuneo exercised his option to purchase the additional property Thomas and Morris were entitled to share equally the commission on the sale of that property.

The theory of the defendant Quinn, as stated in his brief, is "(a) That he was the procuring cause of the sale and the first to introduce the contracting parties. (b) That plaintiff Thomas

entitled to the remainder of said fund for escrow, the sum of ONE HUNDRED FIFTY DOLLARS (\$150.00) for escrow's costs and expenses as aforesaid, to be divided between them in equal proportions; and that their respective shares of the costs of this suit, including attorney's and Master's fees as hereinbefore recommended should be deducted from each of the amounts then due them before payment to them of the amounts then due them; and that all the option to purchase Parcel 'B' herein-after referred to is exercised by the said JOHN F. QUINN and commission thereon will be due to the said T. THOMAS and FRANK R. THOMAS, to be divided between them in equal proportions.

"That Quinn's claim for a commission from the sale on the theory that the sale was made to him in selling through Morris Cunniff at a lower price than they quoted to him is not tenable because Quinn is not the procuring cause of the sale."

"The defendant Quinn is not bound by the terms of the escrow because he signed the said agreement on the condition and with the understanding that it would not be binding upon him until and unless the plaintiff Thomas and defendant Morris signed said escrow, and said escrow was not signed by the defendant Morris. The defendant Quinn, however, is bound by the terms of the escrow because he has recognized the validity of the same by asking here for a return against the funds so deposited in escrow."

### "RECOMMENDATIONS"

"That a decree be entered herein directing the said CONTINENTAL TRUST NATIONAL BANK AND TRUST COMPANY, escrowee, to deduct and retain for itself as its fees and expenses and costs as said escrowee, the sum of ONE HUNDRED FIFTY DOLLARS from said escrow fund of THIRTY-NINE HUNDRED DOLLARS; that the decree provide that in the event the option to purchase said Parcel 'B' herein referred to is exercised by the said JOHN F. QUINN, that the said T. THOMAS and FRANK R. THOMAS and the brokers entitled to share in said commission equally."

"That the prayers of the said Frank R. Quinn and Robert S. Quinn for commission out of said escrow fund on the sale of Parcel 'A', or commission on the sale of Parcel 'B', should be the option of JOHN F. CUNNIFF to purchase be exercised, be denied."

As heretofore stated the decree was entered in accordance with the recommendations of the master that the commission be paid to the escrowee on deposit with the escrowee be paid in equal shares to the plaintiff Thomas and the defendant Morris after deducting fees, costs and charges and that in the event that Cunniff exercised his option to purchase the additional property Thomas and Morris were entitled to share equally the commission on the sale of that property."

The theory of the defendant Quinn, as stated in his brief, is "(a) That he was the procuring cause of the sale and the first to introduce the contracting parties. (b) That plaintiff Thomas

abandoned all efforts to sell the property long before the sale was consummated. (c) That the sellers cannot deprive him of his commission by completing the sale themselves or through Morris, another broker. (d) That, as an alternative theory, Quin contends he is entitled to a judgment in the amount of \$3,900 upon his counterclaim against the sellers."

Plaintiff's theory is that "he and defendant Morris agreed to work together to effect the sale of the suburban farm to Mr. Cuneo; that through their joint efforts the property was sold to Mr. Cuneo; \*\*\* that commissions payable by the owners in respect of the sale are properly payable to plaintiff and defendant Morris;" and "that the evidence clearly supports the findings of the Master; that the exceptions to the Master's report were properly overruled by the Chancellor, and that the decree entered by the Chancellor was in all respects proper."

The theory of the defendant Morris in the trial court was that Thomas had originally negotiated with Cuneo at Morris's suggestion and request but had subsequently abandoned all efforts to close the sale and only reappeared and claimed a right to the commission after Morris had negotiated directly with Cuneo and the owners of the property and brought about the sale.

At the outset we will consider Quin's contention that he "is entitled to his commissions even though Thomas and Morris were the procuring cause of the sale." He states in his brief that "he filed a counterclaim in which he asked a judgment for the amount of the commissions due him against the trustees or owners of the property." A careful examination of his counterclaim reveals that it does not ask for any direct relief against the trustee owners of the property, who were his codefendants. No such relief having been prayed for against said trustees in Quin's counterclaim, the court was without authority to grant it. That Quin's counterclaim was

abandoned all efforts to sell the property long before the sale was consummated. (c) That the sellers cannot deprive him of his commission by completing the sale themselves or through Morris, another broker. (d) That, as an alternative theory, Quinn contends he is entitled to a judgment in the amount of \$3,900 upon his counterclaim against the sellers."

Plaintiff's theory is that "he and defendant Morris agreed to work together to effect the sale of the subscription farm to Mr. Gunno; that through their joint efforts the property was sold to Mr. Gunno; and that commissions payable by the owners in respect of the sale are properly payable to plaintiff and defendant Morris;" and "that the evidence clearly supports the findings of the Master; that the exceptions to the Master's report were properly overruled by the Chancellor, and that the decree entered by the Chancellor was in all respects proper."

The theory of the defendant Morris in the trial court was that Thomas had originally negotiated with Gunno at Morris's suggestion and request but had subsequently abandoned all efforts to close the sale and only reappeared and claimed a right to the commission after Morris had negotiated directly with Gunno and the owners of the property and brought about the sale.

At the outset we will consider Quinn's contention that he "is entitled to his commissions even though Thomas and Morris were the procuring cause of the sale." He states in his brief that "he filed a counterclaim in which he asked a judgment for the amount of the commissions due him against the trustees or owners of the property." A careful examination of his counterclaim reveals that it does not ask for any direct relief against the trustee owners of the property, who were his co-defendants. No such relief having been prayed for against said trustees in Quinn's counterclaim, the court was without authority to grant it. That Quinn's counterclaim was

not directed against the trustee owners is clearly in his failure to secure a rule on them to answer said counterclaim and by the fact that they did not answer it and he secured no default against them for want of an answer. No issue was raised or tried in this cause except the right of the several brokers to receive or share in the funds on deposit representing the commission on the sale of the property and the determination of that issue also determined who was entitled to receive the additional commission of \$4,500, if Cuneo exercised his option to purchase the adjacent property. Quin must be held to have become bound by the terms of the escrow agreement under which the commission presently due was deposited, inasmuch as he filed a counterclaim herein praying that the commission so deposited be turned over to him. We are impelled to hold that Quin had no right to direct relief against the trustee sellers and that any right he might have to relief is restricted to the commission deposited in escrow.

Is Quin entitled to receive or share in the commission deposited in escrow by the sellers?

In our opinion the findings, conclusions and recommendations of the master are amply supported by the evidence. The salient facts disclosed by the evidence are that the defendant Morris, who learned that Cuneo might be interested in the purchase of the Insull property and who did not want to approach him personally in connection with same, because he (Morris) was working with Cuneo on another deal, contacted plaintiff Thomas to the end that the latter would endeavor to sell the Insull farm to Cuneo; that Thomas and Morris entered into an agreement that in the event Cuneo purchased the property through them they would share the commission on the sale equally; that of the brokers involved herein Thomas was the first to bring the property to Cuneo's attention and he did so May 4, 1935; that thereafter he

not directed against the trustee owners is clearly in his failure to secure a title on them to answer said counterclaim and by the fact that they did not answer it and he secured no default against them for want of an answer. No issue was raised or tried in this cause except the right of the several brokers to receive or share in the funds on deposit representing the commission on the sale of the property and the determination of that issue also determined who was entitled to receive the additional commission of \$4,500, if Gunno exercised his option to purchase the adjacent property. Gunno must be held to have become bound by the terms of the escrow agreement under which the commission presently due was deposited, inasmuch as he filed a counterclaim herein praying that the commission be deposited be turned over to him. He was impelled to do so that Gunno had no right to direct relief against the trustee sellers and that any right he might have to relief is restricted to the commission deposited in escrow.

Is Gunno entitled to receive or share in the commission

deposited in escrow by the sellers?

In our opinion the findings, conclusions and recommendations

of the master are amply supported by the evidence. The salient facts disclosed by the evidence are that the defendant Morris, who learned that Gunno might be interested in the purchase of the Insull property and who did not want to purchase him personally in connection with same, because he (Morris) was working with Gunno on another deal, contacted Plaintiff Thomas to the end that the latter would endeavor to sell the Insull farm to Gunno; that Thomas and Morris entered into an agreement that in the event Gunno purchased the property through them they would share the commission on the sale equally; that of the brokers involved herein Thomas was the first to bring the property to Gunno's attention and he did so May 4, 1935; that thereafter he



showed the property to Cuneo, introduced him to at least the sellers and their agent and manager of the property and submitted to said sellers proposals to purchase made by Cuneo, which were rejected; that through visits to Cuneo's office, correspondence with him and by means of the telephone Thomas continued his efforts over a long period of time to sell Cuneo the Insull farm; that no broker was granted an exclusive agency to sell the property; that while Thomas was still negotiating with Cuneo, Quin met the latter for the first time in the Fall of 1935; that thereafter Quin persistently endeavored to bring about the sale of the property but without success; that several proposals or purchases submitted by Cuneo through Quin were rejected; that Cuneo was interested in the property and anxious to purchase same after it was called to his attention but not at the price demanded by the sellers; that no progress was made by any of the brokers in negotiating the sale of the property until June, 1937, when through the instrumentality of Morris a meeting of the principals was arranged; and that at that meeting, which was also attended by Morris, the sale of the property to Cuneo was consummated at a price which represented a substantial reduction from the price theretofore listed with both Thomas and Quin.

Thus we have this situation presented. None of the brokers had an exclusive agency to sell the property. While Thomas was not personally the procuring cause of the sale, it is undisputed that it was he who first brought the property to the purchaser's attention and that thereafter he worked diligently to sell the property to him. Then Quin contacted Cuneo about six months later in connection with the property in question and used his utmost efforts to bring about the sale, persisting in such efforts until the sale was consummated through the instrumentality of Morris. It may well be that Quin could have effected the sale if he had been permitted to do so upon the same terms at which Cuneo finally purchased the property. But Quin is in no better position in that regard than Thomas. In all

showed the property to Gunno, introduced him to at least the sellers and their agent and manager of the property and advised to said sellers proposals to purchase made by Gunno, which were rejected; that through visits to Gunno's office, correspondence with him and by means of the telephone Thomas continued his efforts over a long period of time to sell Gunno the land; that no broker was granted an exclusive agency to sell the property; that while Thomas was still negotiating with Gunno, this was the first time in the fall of 1937; that thereafter Gunno persistently endeavored to bring about the sale of the property but without success; that several proposals or purchases submitted by Gunno through Gun were rejected; that Gunno was interested in the property and anxious to purchase same after it was called to his attention but not at the price demanded by the sellers; that no progress was made by any of the brokers in negotiating the sale of the property until June, 1937, when through the instrumentality of Morris a meeting of the principals was arranged; and that at that meeting, which was also attended by Morris, the sale of the property to Gunno was consummated at a price which represented a substantial reduction from the price theretofore listed with both Thomas and Gun. Thus we have this situation presented. None of the brokers had an exclusive agency to sell the property. While Thomas was not personally the procuring cause of the sale, it is undisputed that he was the first to bring the property to the purchaser's attention and that thereafter he worked diligently to sell the property to him. Then Gun contacted Gunno about six months later in connection with the property in question and used his utmost efforts to bring about the sale, persisting in such efforts until the sale was consummated through the instrumentality of Morris. It may well be that Gun could have effected the sale if he had been permitted to do so upon the same terms at which Gunno finally purchased the property. But Gun is in a better position in that regard than Thomas. In all

likelihood he also could have made the sale to Cuneo at the reduced price.

In our opinion the feature of this case which is of controlling importance is the arrangement made between Thomas and Morris, whereby they agreed to work together to effect the sale to Cuneo. This arrangement was clearly established. Thomas was the broker who first brought the property to the attention of the purchaser, who never thereafter lost interest in it and Morris was the broker, through whose instrumentality the sale was made. "An agreement between brokers co-operating in the sale of land for the division of fees, is not illegal nor against public policy, and it will be construed and enforced the same as other contracts." Nelson on Law of Real Estate Brokerage, 2d Ed., Sec. 144, p. 262; West v. Visalia Abstract Co., 53 Cal. App. 467, 200 Pac. 351.

Defendant Quin strenuously urges that plaintiff Thomas abandoned his negotiations with Cuneo for the sale of the property. There was a conflict in the evidence in this regard, which the master resolved in favor of Thomas, and we think that he was warranted in so doing.

Defendant Quin contends that there is no allegation in plaintiff's complaint to support the finding that the joint efforts of Thomas and Morris were the procuring cause of the sale. We are of opinion that the allegations of the complaint are sufficiently broad to support said finding.

Just what is Quin's position? He was not the first broker who directed Cuneo's attention to the property. He was not the only broker who opened and continued negotiations with Cuneo for the purchase of the property. He was not the broker through whose instrumentality the sale to Cuneo was consummated. He did not earn his commission because he did not

likelihood he also could have made the sale to himself at the reduced price.

In our opinion the terms of the agreement made between Thomas and Morris, whereby they agreed to work together to bring the sale to Gurneo. This arrangement was clearly established. Thomas was the broker who first brought the property to the attention of the purchaser, who never thereafter lost interest in it and Morris was the broker, through whose instrumentality the sale was made. "An agreement between brokers co-operating in the sale of land for the division of fees, is not illegal nor against public policy, and it will be enforced and enforced the same as other contracts." Nelson on Law of Real Estate, 2d Ed., sec. 144, p. 302; West v. Wessalia Abstract Co., 53 Cal. App. 407, 200 Pac. 391.

Defendant again strenuously denies that plaintiff Thomas abandoned his negotiations with Gurneo for the sale of the property. There was a conflict in the evidence in this regard, which the master resolved in favor of Thomas, and we think that he was warranted in so doing.

Defendant again contends that there is no evidence in plaintiff's complaint to support the finding that the joint efforts of Thomas and Morris were the procuring cause of the sale. We are of opinion that the allegations of the complaint are sufficiently broad to support said finding.

Just what is Gurneo's position? He was not the first broker who directed Gurneo's attention to the property, he was not the only broker who opened and continued negotiations with Gurneo for the purchase of the property. He was not the broker through whose instrumentality the sale to Gurneo was consummated. He did not earn his commission because he did not

produce a purchaser. He came near doing so, but he did not. Under the circumstances he was not wronged - he was only unfortunate.

In discussing the question of intervening brokers in Nelson on Law of Real Estate Brokerage, supra, the author makes this statement at p. 203: "It would be at variance with all practical rules, to require the party selling to pronounce, under penalty of paying double commissions, upon the metaphysical question, which agent, under the circumstances, was the efficient cause of the sale. In the absence of all collusion on the part of the vendor, the agent through whose instrumentality the sale was carried to a successful conclusion is the procuring cause thereof."

In so far as the evidence and its weight and the credibility of the witnesses is concerned, the rule enunciated in Pasedach v. Auw, 364 Ill. 491, is applicable here. There the court said at p. 496

"The master in chancery saw the witnesses and heard them testify. It was his province in the first instance to determine the facts. While his finding of facts does not carry the same weight as the verdict of a jury, nor of a chancellor where the witnesses have testified before him, yet the master's findings are entitled to due weight on review of the cause. (Keuper v. Mette, 239 Ill. 586.) His conclusions as to the facts have been approved by the chancellor. In that situation we are not justified in disturbing the findings unless they are manifestly against the weight of the evidence. North Side Sash and Door Co. v. Hecht, 295 Ill. 515; Klekamp v. Klekamp, 275 id. 98."

Since the joint efforts of plaintiff Thomas and defendant Morris were the procuring cause of the sale, they are entitled to share equally in the commission deposited in escrow and the additional commission due from the sellers in the event that Cuneo exercised his option to purchase the adjacent parcel of land.

The decree of the Circuit court is affirmed.

DECREE AFFIRMED.

Scanlan, P. J., and Friend, J., concur.

produce a purchaser. He came next doing so, but he did not. Under the circumstances he was not wronged - he was only unfairly treated.

In discussing the question of intervening brokers in Wilson on law of Real Estate Brokerage, and, the author makes this statement at p. 205: "It would be at variance with all practical rules to require the party selling to pronounce, under penalty of paying double commissions, upon the metaphysical question, which agent, under the circumstances, was the efficient cause of the sale. In the absence of all collusion on the part of the vendor, the agent through whose instrumentality the sale was carried to a successful conclusion is the procuring cause thereof."

In so far as the evidence and its weight and the credibility of the witnesses is concerned, the rule enunciated in Paschbach v. A.W., 364 Ill. 491, is applicable here. Thus the court said at p. 492

"The master in chancery saw the witnesses and heard them testify. It was his province in the first instance to determine the facts. While his finding of facts does not carry the same weight as the verdict of a jury, nor of a chancellor where the witnesses have testified before him, yet the master's findings are entitled to due weight on review of the cause. (Hedger v. Mette, 239 Ill. 586.) His conclusions as to the facts have been approved by the chancellor. In that situation we are not justified in disturbing the findings unless they are manifestly against the weight of the evidence. (North Side Gas & Coal Co. v. Wright, 299 Ill. 575; Kiekamp v. Kiekamp, 277 Ill. 98.)"

Since the joint efforts of plaintiff Thomas and defendant Morris were the procuring cause of the sale, they are entitled to share equally in the commission deposited in escrow and the additional commission due from the sellers in the event that Cane exercised his option to purchase the adjacent parcel of land. The decree of the Circuit court is affirmed.  
DOCKRE AFFIRMED.

Scamman, P. J., and Friend, J., concur.

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SHORE MANAGEMENT CORPORATION,  
Appellee,

v.

ARTHUR ERICKSON and ANTHONY  
ERICKSON, doing business as  
C. A. ERICKSON BROS.,  
Appellants.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

314 I.A. 571

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Shore Management Corporation, was organized as an Illinois stock corporation on October 10, 1930. It was dissolved by decree of the Superior court June 21, 1934 for failure to file its annual report and to pay its franchise tax and that decree has not been vacated. On October 30, 1935, more than fourteen months after its dissolution, Shore Management Corporation caused a judgment by confession for \$1,679.28 to be entered upon four notes against the defendants, Arthur Erickson and Anthony Erickson, the makers of the notes. The Shore Management Corporation had received these notes by assignment but it does not appear when it became the owner thereof. Subsequent to the entry of the judgment by confession, plaintiff instituted several garnishment proceedings based on said judgment, upon which it collected \$473.75. The original judgment was satisfied to this extent, On June 6, 1936 plaintiff instituted a garnishment proceeding against Ray W. Summe & Co., in which it was claimed that said garnishee was indebted to defendants. On June 16, 1936, defendants filed a verified petition to vacate the judgment by confession, alleging therein that they had been apprised of the garnishment summons issued and served upon Summe & Co.; that that was their first notice that the judgment by confession had been entered against them; that plaintiff corporation having been dissolved on June 21, 1934, it was not a legal entity when this action was brought on October 30, 1935; and that it therefore had no capacity to sue.

SHORE MANAGEMENT CORPORATION,  
Appellee,

vs. ARTHUR BRICKSON and ANTHONY

COURT REPORTER, INC.,

ARTHUR BRICKSON and ANTHONY  
BRICKSON, Doing Business as  
C. A. BRICKSON BROS.,  
Plaintiffs.

MR. JUSTICE SULLIVAN DELIVERED THE JUDGMENT OF THE COURT.

Plaintiff, Shore Management Corporation, was organized

as an Illinois stock corporation on October 10, 1930. It was

dissolved by decree of the Superior Court June 21, 1934 for

failure to file its annual report and to pay its franchise tax  
and that decree has not been vacated. On October 30, 1935, more

than fourteen months after its dissolution, Shore Management

Corporation caused a judgment by confession for \$1,072.28 to be

entered upon four notes against the defendants, Arthur Brickson  
and Anthony Brickson, the makers of the notes. The Shore Manage-ment Corporation had received these notes by assignment but it  
does not appear when it became the owner thereof. Subsequent to

the entry of the judgment by confession, Plaintiff instituted

several garnishment proceedings based on said judgment, upon

which it collected \$473.75. The original judgment was satisfied

to this extent. On June 6, 1936 Plaintiff instituted a garnishment

proceeding against Ray W. Gurne &amp; Co., in which it was claimed that

said garnishee was indebted to defendants. On June 16, 1936, defend-

ants filed a verified petition to vacate the judgment by confession,

alleging therein that they had been apprised of the garnishment

summons issued and served upon Gurne &amp; Co.; that that was their

first notice that the judgment by confession had been entered

against them; that Plaintiff corporation having been dissolved on

June 21, 1934, it was not a legal entity when this action was brought

on October 30, 1935; and that it therefore had no capacity to sue.



On September 4, 1936, pursuant to an agreed order to that effect, defendants' petition to vacate the judgment by confession was withdrawn. It does not appear why said petition was withdrawn. On April 3, 1941, plaintiff instituted a supplemental citation proceeding in this cause for the appearance and examination under oath of the defendants and a supplemental defendant, C. A. Erickson, concerning the property of said defendants. Thereupon, on April 29, 1941, defendants filed a verified petition "to vacate, set aside and hold for naught the judgment entered herein on October 30, 1935, and, by the order of this Court, to abate and dismiss the plaintiff's suit herein and to quash all outstanding process issued on said judgment," which motion alleged "that there is not now nor was there at the time and date of the commencement of this suit and the entry of the judgment by confession herein any such corporation as the Shore management Corporation, as by the statement of claim filed herein and by the above action is supposed; and that, if such Shore Management Corporation ever existed, it was dissolved by proceedings had in the Superior court of Cook county, Illinois, on, to-wit, June 21, 1934, in chancery, Case No. 68438, and which proceedings have not since been vacated, set aside or reversed, but remain in full force and effect." On September 19, 1941 an order was entered by the trial court denying defendants' motion to vacate the judgment entered by confession. Defendants prosecute this appeal from said order.

Defendants' theory as stated in their brief is as follows:

"That the dissolution proceedings of the Shore Management Corporation, the alleged and pretended plaintiff, by the Attorney General of the State of Illinois, had put an end to its existence so that at the time of the filing of the action it had no capacity to sue nor to maintain the prosecution of a suit in any manner whatsoever, including the bringing and prosecution of the supplemental proceedings which was in the nature of a creditor's suit and a new action. There could

On September 4, 1936, pursuant to an order of the court, the defendants' petition to vacate the judgment by confession was drawn. It does not appear why said petition was not filed. On April 3, 1941, plaintiff instituted a supplemental citation proceeding in this cause for the appearance and examination under oath of the defendants and a supplemental return, C. M. Erickson, concerning the property of said defendants. Thereafter, on April 29, 1941, defendants filed a verified petition "to vacate, set aside and hold for nought the judgment entered herein on October 30, 1936, and, by the order of this Court, to abate and dismiss the plaintiff's suit herein and to quash all outstanding process issued on said judgment," which motion alleged "that there is not now nor was there at the time and date of the commencement of this suit and the entry of the judgment by confession herein any such corporation as the Shore Management Corporation, as by the statement of claim filed herein and by the above action is supposed; and that, if such Shore Management Corporation ever existed, it was dissolved by proceedings had in the Superior Court of Cook County, Illinois, on to-wit, June 21, 1934, in chambers, Case No. 68438, and which proceedings have not since been vacated, set aside or reversed, but remain in full force and effect." On September 19, 1941 an order was entered by the trial court denying defendants' motion to vacate the judgment entered by confession. Defendants prosecute this appeal from said order.

Defendants' theory as stated in their brief is as follows:

"That the dissolution proceedings of the Shore Management Corporation, alleged and pretended plaintiff, by the Attorney General of the State of Illinois, had put an end to its existence so that at the time of the filing of the action it had no capacity to sue nor to maintain the prosecution of a suit in any manner whatsoever, including the bringing and prosecution of the supplemental proceedings which was in the nature of a creditor's suit and a new action. There could

be no officers, directors, representatives or agents to employ attorneys to institute and prosecute suits, collect judgment, receive payment and enter satisfaction thereof."

There can be no question but that plaintiff, Shore Management Corporation, had no legal capacity to sue after its dissolution on June 21, 1934. When it instituted this action on October 30, 1935, it lacked such capacity. The General Corporation act of 1919 provided for the survival of actions by and against a dissolved corporation for two years after its dissolution. That act (par. 14, sec. 14, chap. 32, Cahill's Ill. Rev. Stat. 1927) provided:

"All corporations organized under the laws of this State, whose powers may have expired by limitation or otherwise, shall continue their corporate capacity for two years for the purpose only of collecting debts due such corporation and selling and conveying the property and effects thereof. Such corporations shall use their respective names for such purposes and shall be capable of prosecuting and defending all suits at law or in equity."

When the Business Corporation act was enacted in 1933, it expressly repealed the old Corporation act of 1919. Section 167 of the act of 1933 (par. 157.167, chap. 32, Ill. Rev. Stat. 1937) provides:

"Repeal. The act entitled 'An Act in Relation to Corporations for Pecuniary Profit,' approved June 28, 1919, in force July 1, 1919, as amended, is hereby repealed."

The section of the Business Corporation act of 1933 dealing with "Survival of Remedy After Dissolution" (par. 157.94, sec. 94, chap. 32, Ill. Rev. Stat. 1937) is as follows:

"The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the Secretary of State, or (2) by the decree of a court of equity when the court has not liquidated the assets and business of the corporation, or (3) by expiration of its period of duration, shall not take away or impair any remedy given against such corporation, its directors, or shareholders, for any liability incurred prior to such dissolution if suit thereon is brought and service of process had within two years after the date of such dissolution. Such suits may be prosecuted against and defended by the corporation in its corporate name."

It will be noted that the provisions of the foregoing section 94 permit actions to be brought against a dissolved corporation, its directors or shareholders within two years after its dissolution on

be no officers, directors, representatives or agents of the corporation, attorneys to institute and prosecute suits, collect payment, receive payment and enter satisfaction thereon."

There can be no question but that initially, the corporation had no legal capacity to sue after its dissolution on June 21, 1934. When it transferred this action on October 30,

1935, it lacked such capacity. The general corporation act of 1933 provided for the survival of actions by and against a dissolved corporation for two years after its dissolution. That act (par. 14, sec. 14, chap. 32, Stat. 1933) provided:

"All corporations organized under the laws of this state whose powers may have expired by limitation or otherwise, shall continue their corporate capacity for two years for the purpose only of collecting debts due such corporation and selling and conveying the property and effects thereof. Such corporations shall use their respective names for such purposes and shall be capable of prosecuting and defending all suits at law or in equity."

When the Business Corporation Act was enacted in 1934, it expressly repealed the old corporation act of 1933. Section 16 of the act of 1933 (par. 15, chap. 32, Stat. 1933) provides:

"Repeal. The act entitled 'An Act in Relation to Corporations for Pecuniary Profit,' approved June 28, 1919, in force July 1, 1919, as amended, is hereby repealed."

The section of the Business Corporation Act of 1933 dealing with "Survival of Remedy After Dissolution" (par. 15, sec. 16, chap. 32, Stat. 1933) is as follows:

"The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the secretary of state, or (2) by the decree of a court of equity when the court has not liquidated the assets and business of the corporation, or (3) by liquidation of its period of duration, shall not take away or impair any remedy given against such corporation, its directors or shareholders, for any liability incurred prior to such dissolution or suit thereon as brought and service of process had within two years after the date of such dissolution. Such suits may be prosecuted against and defended by the corporation in its corporate name."

It will be noted that the provisions of the foregoing section 16 permit actions to be brought against a dissolved corporation, its directors or shareholders within two years after its dissolution on

any liability incurred prior to its dissolution, but that there is no provision in that section of the Business Corporation act of 1933 which permits a dissolved corporation to bring actions after its dissolution. It is the general rule that after a corporation is dissolved it is incapable of maintaining an action in the absence of statutory authority. In American Exchange Bank v. Mitchell, 179 Ill. App.<sup>612</sup>, the court said at p. 615:

"There are at least two errors appearing in this record, each of which is conclusive against the defendant in error, and must work a reversal of this case. The first arises from the want of a plaintiff with capacity to maintain the suit.

"In all civil actions the prime requisite as to parties is that the plaintiff and the defendant must each be either a natural or artificial person.

"A civil action can be maintained only in the name of a person in law, an entity which the law of the forum can recognize as capable of possessing and asserting a right of action." Ency. Pleading and Practice, Vol. 15, p. 1478.

"After a corporation is dissolved it is incapable of maintaining an action. All action by a corporation which is pending when such corporation is dissolved abates upon such dissolution in the absence of a statute to the contrary. Ency. Pleading and Practice, vol. 5, p. 96."

In Fletcher Cyclopedia Corporations, Permanent Edition, vol. 16, sec. 8142, the author makes this statement at p. 885:

"A corporation's capacity to sue and be sued terminates at common law when the corporation is legally dissolved. Thereafter proceedings may be prosecuted in equity to wind up the corporation and adjudicate the rights of creditors, but in the absence of statutory provisions to the contrary, no action of law can be maintained by or against it as a corporate body or in its corporate name. It is not amenable to process and is incapable of making an appearance or of authorizing an attorney to make an appearance in its behalf. An action pending by or against it at the time of dissolution ordinarily abates and cannot be prosecuted to judgment. A judgment rendered against a corporation before its dissolution cannot be reviewed after its dissolution nor when a corporation ceases to exist absolutely can proceedings be maintained to set aside a judgment or decree in its favor, when it must be made a party to such proceedings."

In Billiard Table Mfg. Corp. v. First-Tyler Bank & T. Co., 16 Fed. Supp. 998 (U. S. District Court, N. D., W. Va.) the court said at p. 992:

"Before the passage of the 1933 Illinois Business Corporation

any liability incurred prior to the dissolution, but the mere fact that there is no provision in that section of the Business Corporations Act of 1933 which permits a dissolved corporation to bring actions after its dissolution. It is the general rule that after a corporation is dissolved it is incapable of maintaining an action in the absence of statutory authority. In Quentin's Exchange Bank v. Mitchell, 179 Ill. 401, 100 Ill. App. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 90

"There are at least two errors appearing in this record, each of which is conclusively sustained by the evidence and must work a reversal of this case. The first error is the fact that the defendant was not present at the time of the trial, and the second is the fact that the defendant was not present at the time of the trial."

"In all civil actions the prima facie evidence is that the plaintiff and the defendant were both persons natural or artificial person."

"A civil action can be maintained only in the name of a person in law, an entity which the law of the forum can recognize as capable of possessing and asserting a right of action." *Wong, Pleading and Practice*, Vol. 12, p. 1478.

"After a corporation is dissolved it is incapable of maintaining an action. All action by a corporation which is pending when such corporation is dissolved is a dead end. Dissolution in the absence of a statute to the contrary. They. Pleading and Practice, vol. 2, p. 88."

vol. 16, sec. 8142, the subject makes this statement at p. 885:

"A corporation's capacity to sue and be sued terminates at common law when the corporation is legally dissolved. Thereafter proceedings may be presented in regard to the corporation and adjustments the rights of creditors, but in the absence of statutory provisions to the contrary, no action of law can be maintained by or against it as a corporate body or in the corporate name. It is not amenable to process and is incapable of making an appearance or of authorizing an attorney to make an appearance in its behalf. An action pending by or against it at the time of dissolution ordinarily abates and cannot be presented to judgment. A judgment rendered against a corporation before its dissolution cannot be reviewed after its dissolution nor can a corporation be sued specially or generally on proceedings commenced before its dissolution, where it must be made a party to such proceedings."

is being said to p. 222:

10 Fed. Supp. 998 (U. S. District Court, N. D. Cal., 1954).

In Billings Table 11A, Cont. V. Wright-Lyons Table 11A, Cont.

"Before the passage of the 1933 Illinois Business Corporation

Act, an Illinois corporation had the right and power to collect debts due it and to maintain suits in its corporate name for the same for a period of two years after its date of dissolution. Illinois Business Corporation Act of June 28, 1919, in force July 1, 1919, Laws Ill. 1919, p. 320, sec. 14 (Smith-Hurd Ill. Stats., c. 32, sec. 157.94 note). However, in the enactment of the 1933 Illinois Business Corporation Act this right and power was withdrawn by the Legislature by the omission of the former provisions from the new act. Illinois Business Corporation Act, in force July 13, 1933, sec. 94 et seq., Acts of General Assembly of State of Illinois 1933, at pages 308, 354 et seq. (Smith-Hurd Ill. Stats. c. 32, sec. 157.94 et seq.) In the 1933 act, upon application of any interested party, the assets of any corporation undergoing involuntary liquidation may be collected by the appointment of receivers to collect the same pending dissolution. Illinois Business Corporation Act, in force July 13, 1933, sections 86 and 87."

Even though the Shore Management Corporation had not been dissolved, it was precluded from instituting or maintaining this action against the defendants. Paragraph 157.142, section 142 of the Business Corporation act provides in part as follows:

"No corporation required to pay a franchise tax, license fee or penalty under this Act shall maintain any action at law or suit in equity until all such franchise taxes, license fees and penalties have been paid in full."

The record shows that plaintiff had not paid its franchise tax and under this positive prohibition of the statute it could not maintain any suit, either at law or in equity, as long as it was delinquent in such payment.

It seems clear that plaintiff, Shore Management Corporation, which was a dissolved corporation, had no right to bring this action. However, plaintiff insists that defendants are barred from questioning its right to bring this action against them because (1) the public policy of this state as established by the decisions of our courts of review gave it a common law action against defendants until the Statute of Limitations had run against its claim; (2) defendants are estopped by their conduct during the course of this litigation from challenging its capacity to sue; and (3) the filing of defendants' petition to vacate on June 16, 1936 on the same grounds as are asserted in their petition of April 29, 1941 to vacate the judgment by confession is res judicata of the latter petition.

Act, an Illinois corporation, and its right to collect debts due it and to maintain suits in its corporate name for the same for a period of two years after the date of dissolution of the Illinois Business Corporation Act of June 26, 1911, in force July 1, 1912, laws 1911, 1912, c. 32, sec. 34, and Ill. Stats., c. 32, sec. 17.04 (note). However, in the exercise of the 1913 Illinois Business Corporation Act, the right and power was withdrawn by the legislature by the enactment of the former provisions from the act. Illinois Business Corporation Act, in force July 13, 1913, laws 1912, 1913, c. 32, sec. 34, and Ill. Stats., c. 32, sec. 17.04 (note). It is held that the application of any interested party, the assets of any corporation undergoing involuntary liquidation may be collected by the appointment of receivers to collect the same pending dissolution. Illinois Business Corporation Act, in force July 13, 1913, laws 1912, 1913, c. 32, sec. 34, and Ill. Stats., c. 32, sec. 17.04 (note).

Even though the Illinois Business Corporation Act had not been dissolved, it was provided that dissolution or liquidation of this

action against the defendants, laws 1912, 1913, c. 32, sec. 34, and Ill. Stats., c. 32, sec. 17.04 (note).

of the Business Corporation Act provided in part as follows:

"No corporation required to pay a franchise tax, license fee or penalty under this act shall maintain any action at law or suit in equity until all such franchise taxes, license fees and penalties have been paid in full."

The record shows that plaintiff had not paid the franchise

tax and under this positive prohibition of the statute it could not maintain any suit, either at law or in equity, as long as it was delinquent in such payment.

It seems clear that plaintiff, here named as corporation, which was a dissolved corporation, had no right to bring this action.

However, plaintiff insists that defendants are barred from questioning

its right to bring this action against them because (1) the public policy of this state as established by the decisions of our courts of review gave it a common law action against defendants until the statute of limitations had run against its claim; (2) defendants

are estopped by their conduct during the course of this litigation from challenging its capacity to sue; and (3) the filing of defendants' petition to vacate on June 16, 1936 on the same grounds as

are asserted in their petition of April 20, 1941 to vacate the judgment by confession is res judicata of the latter petition.



There is no merit in plaintiff's first contention. The authorities heretofore cited show conclusively that a dissolved corporation has no common law right to maintain an action and that it can only do so by statutory grant of authority. The rule pertaining to the doctrine of public policy in this state has been repeatedly enunciated by our Supreme court. In Colgrove v. Lowe, 343 Ill. 360, the court said at p. 362: "There is no precise definition of public policy, and consequently no absolute rule by which a contract can be measured or tested to determine whether or not it is contrary to public policy. The public policy of a state or nation is to be found in its constitution and statutes, and when cases arise concerning matters upon which they are silent then in its judicial decisions and the constant practice of government officials. (Ziegler v. Illinois Trust and Savings Bank, 245 Ill. 180 and cases cited.)" While section 94 of the Business Corporation act makes no mention of a dissolved corporation's right to bring an action, the Legislature manifested its intention to withdraw such right by its express repeal of the old act and by its failure to include a provision for such remedy in the new act.

As to plaintiff's contention that defendants are estopped from challenging its capacity to bring this action, it is sufficient answer to state that since section 94 of the Business Corporation act conferred no authority on a dissolved corporation to sue and since section 142 of said act positively prohibited plaintiff from suing so long as it was delinquent in the payment of its franchise tax, the institution of this action did not bring before the court a party plaintiff over which it could have jurisdiction and nothing that defendants did or failed to do during the course of this litigation could confer jurisdiction on the court over the Shore Management Corporation as a party plaintiff where the court otherwise lacked such jurisdiction. "A civil action can be maintained only in the name of a person in law, an entity which the law of the forum can

There is no merit in plaintiff's first contention. The authorities heretofore cited show conclusively that a dissolved corporation has no common law right to maintain an action and that it can only do so by statutory grant of authority. The rule pertaining to the doctrine of public policy in this state has been repeatedly enunciated by our Supreme Court. In Colgrove v. Lowe, 343 Ill. 360, the court said at p. 362: "There is no precise definition of public policy, and consequently no absolute rule by which a contract can be measured or tested to determine whether or not it is contrary to public policy. The public policy of a state or nation is to be found in its constitution and statutes, and when cases arise concerning matters upon which they are silent then in its judicial decisions and the constant practice of government officials." (Stokjer v. Illinois Trust and Savings Bank, 345 Ill. 180 and cases cited.) "While section 94 of the Business Corporation Act makes no mention of a dissolved corporation's right to bring an action, the legislature manifested its intention to withdraw such right by its express repeal of the old act and by its failure to include a provision for such remedy in the new act. As to plaintiff's contention that defendants are estopped from challenging its capacity to bring this action, it is sufficient answer to state that since section 94 of the Business Corporation Act conferred no authority on a dissolved corporation to sue and since section 142 of said act positively prohibited plaintiff from suing so long as it was delinquent in the payment of its franchise tax, the institution of this action did not bring before the court a party plaintiff over which it could have jurisdiction and nothing that defendants did or failed to do during the course of this litigation could confer jurisdiction on the court over the Share Management Corporation as a party plaintiff where the court otherwise lacked such jurisdiction. "A civil action can be maintained only in the name of a person in law, an entity which the law of the forum can

recognize as capable of possessing and asserting a right of action" and "if the suit is brought in a name which is that of neither a natural person, a corporation or a partnership, it is a mere nullity." 47 C. J., secs. 16 and 24. The Shore Management Corporation, having been dissolved, was no longer in existence in so far as its capacity to maintain this action is concerned. Therefore this entire proceeding, including the judgment by confession, is a mere nullity. In view of what has already been said, plaintiff's contention that defendants' petition to vacate of June 16, 1936 is res judicata of their later petition to vacate the judgment by confession is without merit. In any event since there was no determination of any issue presented by defendants' petition to vacate of June 16, 1936, said petition having been withdrawn, the doctrine of res judicata is inapplicable.

The motion heretofore made by defendants to strike plaintiff's appearance, its additional abstract of record and its brief and argument, which was reserved to hearing, is at this time denied.

We have given careful consideration to all the points urged and the authorities cited but in the view we take of this case we deem further discussion would serve no useful purpose.

For the reasons stated herein the order of the Municipal court of Chicago, from which this appeal is taken, is reversed and the cause is remanded with directions to sustain defendants' motion to vacate the judgment by confession, to quash all outstanding process issued in this cause and to dismiss this suit.

REVERSED AND REMANDED WITH DIRECTIONS.

Scanlan, P. J., and Friend, J., concur.

recognize as capable of possessing and asserting a right of action" and "it is known in some cases which is that of neither a natural person, a corporation or a partnership, it is a mere nullity." 47 C. 2, sec. 10 and 11. The above language, Corporation, having been dissolved, was no longer in existence in so far as its capacity to maintain this action is concerned. Therefore this entire proceeding, including the judgment by confession, is a mere nullity. In view of what has already been said, plaintiff's contention that defendant's petition to vacate of June 16, 1936 is res judicata of their later petition to vacate the judgment by confession is without merit. In any event since there was no determination of any issue presented by defendant's petition to vacate of June 16, 1936, said petition having been withdrawn, the doctrine of res judicata is inapplicable.

The motion heretofore made by defendant to strike plaintiff's appearance, its additional abstract of record and its brief and argument, which was reserved to hearing, is at this time denied. We have given careful consideration to all the points urged and the authorities cited but in the view we take of this case we deem further discussion would serve no useful purpose. For the reasons stated herein the order of the Municipal Court of Chicago, from which this appeal is taken, is reversed and the cause is remanded with directions to sustain defendant's motion to vacate the judgment by confession, to quash all outstanding process issued in this cause and to dismiss this suit.

REVEREND AND HONORABLE WITH DIRECTIONS.

Seaman, P. J., and Friend, J., concur.

IN THE APPELLATE COURT OF ILLINOIS,  
SECOND DISTRICT  
FEBRUARY TERM, A. D. 1942.

814 I.A. 571<sup>2</sup>

IN THE MATTER OF THE ESTATE OF MARY  
ELIZABETH MURR, deceased.

THELMA BOWMAN RODESEILER and  
ARGYLE BOWMAN,

Appellants,

vs.

JOHN CLEVELAND MURR, Executor  
of the Estate of Mary Elizabeth  
Murr, deceased.

Appellee.

APPEAL FROM CIRCUIT COURT  
DUPAGE COUNTY.

HUFFMAN - P.J.

Appellee is the executor of the estate of Mary Elizabeth Murr. She died on June 6, 1937, seized with a farm, a house and lot in the city of Naperville, together with certain personal property and securities. It appears that following the death of Mrs. Murr, the real estate was made the subject of a suit for partition, and that appellee purchased the same at the partition sale; that thereafter, by stipulation to which appellants were parties, it was provided and agreed that the rents accruing from the real estate

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1945.

3141A.571

IN THE MATTER OF THE ESTATE OF MARY  
ELIZABETH MURR, deceased.

ARGYLE BOWMAN,  
THIRMA BOWMAN, ROBERT BOWMAN and

Appellants,

vs.

JOHN OLIVELAND MURR, Executor  
of the Estate of Mary Elizabeth  
MURR, deceased.

Appellee.

APPEAL FROM CIRCUIT COURT  
OUTAGE COUNTY.

HUTTMAN - P. 1.

Appellee is the executor of the estate of Mary Elizabeth Murr. She died on June 6, 1937, seized with a farm, a house and lot in the city of Naperville, together with certain personal property and securities. It appears that following the death of Mrs. Murr, the real estate was made the subject of a suit for partition, and that appellee purchased the same at the partition sale; that thereafter, by stipulation to which appellants were parties, it was provided and agreed that the rents accruing from the real estate

subsequent to the death of Mrs. Murr, and prior to the date of sale for partition, should be taken by appellee and accounted for by him in his accounts as executor.

On March 20, 1941, appellee filed a report in the County Court of DuPage county, which reflected his acts and accounts as executor. In this report, pursuant to the stipulation, he accounted for the rents collected from the real estate from the date of the death of Mrs. Murr to the date of the sale thereof in partition. In this report he took credit for certain payments made during such time for maintenance, repairs and taxes on the land involved. It appears that he reported a total amount of \$1650 collected in rents during such period, and took credit for \$480.96 for money expended for the purpose of maintenance and upkeep of the city house, the farm and farm buildings. His report also showed the allowance of a claim in his favor against the estate, of \$1467.97, under date of February 23, 1939.

On March 27, 1941, appellants filed objections in the County Court to the items of appellee's report, with respect to the sums expended for maintenance, repair and upkeep to the farm and the house in Naperville, and to the allowance of his claim against the estate. The County Court denied all of the objections, approved and confirmed the report as filed. The objectors there (appellants here) appealed to the Circuit Court of DuPage county, where the objections were again overruled and the report approved. This appeal follows from the judgment and decree of the Circuit Court approving appellee's report.

subsequent to the death of Mr. [redacted], and upon the date of sale for partition, should be taken by [redacted] and accounted for by him in his accounts as executor.

On March 22, 1941, appellee filed a report in the County Court of DuPage county, which reflected his net and accurate as executor. In this report, pursuant to the stipulation, he accounted for the rents collected from the real estate from the date of the death of Mrs. Mann to the date of the sale thereof in partition. In this report he took credit for certain payments made during such time for maintenance, repairs and taxes on the land involved. It appears that he reported a total amount of \$1,685.38 collected in rents during such period, and took credit for \$480.38 for taxes expended for the purpose of maintenance and repairs on the land and the farm and farm buildings. His report also shows the allowance of a claim in his favor against the estate, of \$147.07, under date of February 25, 1939.

On March 27, 1941, appellee filed objections in the County Court to the items of appellee's report, with respect to the sum expended for maintenance, repairs and taxes on the land and the house in Naperville, and to the allowance of his claim against the estate. The County Court denied all of the objections, allowed and confirmed the report as filed. The objections were (appellee now) appealed to the Circuit Court of DuPage county, where the objections were again overruled and the report approved. This appeal follows from the judgment and decree of the Circuit Court approving appellee's report.



Appellants urge for reversal that the Court erred in approving the report and in overruling their objections thereto. The assignment of error is most general. Only two witnesses testified, appellee and a Mr. Friedrich. They both testified on behalf of appellee. There was no cross examination of either witness. Therefore, the facts with respect to the items of expenditure made by appellee in and about the upkeep and repair of the premises during the years involved, are not in dispute. The stipulation between the parties growing out of the partition suit provided that appellee should take such rents and make his accounting therefor to the other children in his account as executor. It appears that this is what he did. The trial court evidently considered that under the stipulation, appellee took the rents and looked after the property as a co-tenant, rather than as executor of the estate acting in an official capacity. The evidence supports the position of the trial court in this regard. Appellants in their argument urge that the Court erred in sustaining the claim allowed appellee in the County Court because he failed to prove the validity thereof in the present hearing in the Circuit Court. There is nothing in this record which in any way tends to impugn the validity or propriety of the claim as allowed in the County Court. It was allowed in that Court on February 23, 1939. No appeal was ever taken from the order allowing the claim, and nothing appears to show that any action was pending against the claim for fraud, collusion or mistake in connection with the allowance thereof. Appellee testified with regard to the collection of the rents following the death of his mother, and the items expended therefrom for repairs and main-

Appellate were for reversal of the Court's decision in favoring the report and in overruling their objections thereto. The assignment of error is most general. Only two instances are cited, appellee and a Mr. H. H. H. They both resulted on behalf of appellee. There was no cross examination of either witness. Moreover, the facts with respect to the facts examined were by appellee in and about the books and records of the parties and the parties involved, are not in dispute. The situation between the parties from the out of the partition suit provided that each should take such part and make his accounting of same to the other children in his account as executor. It is also stated that he did. The total count evidently considered that under the situation, appellee took the rents and looked after the property as a co-tenant, rather than as executor of the estate acting in an official capacity. The evidence supports the position of the total count in this regard. Appellants in their argument urge that the Court erred in sustaining the claim allowed appellee in the County Court because he failed to prove the validity thereof in the present hearing in the Circuit Court. There is nothing in this record which in any way tends to throw the validity or propriety of the claim as allowed in the County Court. It was allowed in that Court on February 23, 1930. No appeal was ever taken from the order allowing the claim, and nothing appears to show that any action was pending against the claim for fraud, collusion or mistake in connection with the allowance thereof. Appellee testified with regard to the collection of the rents following the death of his mother, and the items expended therefrom for repairs and main-

tenance to the property, exhibiting receipts for such expenditures.

It does not appear here that the correctness or propriety of the accounts as reflected by the appellee's report are in any way attacked. Mere formal objections were filed thereto, which two courts have heard and denied.

We are not disposed to disturb the judgment herein.

Judgment affirmed.

tenance to the property, exhibiting receipt for such ex-emption.  
It does not appear how the correspondence or property of  
the accounts as reflected by the schedule's report are in any way  
attached. Many formal objections were filed thereon, which the  
courts have heard and denied.  
We are not disposed to disturb the judgment herein.

Witness my hand.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

314 I.A. 572

FEBRUARY TERM, A.D. 1942

EDWARD C. DWYER AND PAULINE  
ROSE DWYER, husband and wife,  
et al.,

Appellées

vs.

VILLAGE OF GLEN ELLYN,

Appellant

APPEAL FROM  
CIRCUIT COURT  
OF DU PAGE COUNTY.

DOVE, J.:

Edward C. Dwyer and Pauline Rose Dwyer, his wife, Jacob A. Nelson and Anny S. Nelson, his wife, and Constance A. Sevland, are the respective owners of three contiguous tracts of land outside the village of Glen Ellyn, in close proximity to the north corporate boundary. They brought an action in the circuit court of DuPage County against the village for damages to their respective premises on account of the overflow thereof, and for an injunction restraining the continuance of such overflow. Upon a trial by the court without a jury, judgment against the village for \$1250.00 in favor of the Dwyers, and in favor of the village against the other plaintiffs, was entered, and the injunction was denied. The village has appealed from that part of the judgment against it. A cross appeal from that part of the judgment against the other plaintiffs and denying the injunction, was filed, but is not argued in this court, and no grounds for the cross appeal appear in appellee's brief, which concludes by urging that the judgment be affirmed. This leaves for

IN THE

COURT OF THE DISTRICT OF COLUMBIA

3141418

DOUGLAS

THE DISTRICT OF COLUMBIA

EDWARD G. Dwyer and wife,  
ROSE DWYER, Plaintiff and wife,  
et al.,

vs.

VILLAGE OF SHELL HILL

Defendant

DOVE, J.

Edward G. Dwyer and his wife, Rose Dwyer, his wife, and their respective children, his wife, and their respective children, are the owners of three contiguous lots of land located in the village of Glen Ellyn, in close proximity to the North and South boundaries. They brought an action in the circuit court of Cook County against the village for damages to their property in respect to the overflow thereof, and for an injunction restraining the continuance of such overflow. Upon a trial by the court without a jury, judgment against the village for \$180.00 in favor of the Dwyers, and in favor of the village against the other plaintiffs, was entered, and the injunction was denied. The village has appealed from that part of the judgment against it. A cross appeal from that part of the judgment against the other plaintiffs, and denying the injunction, was filed, but is not entered in this court, and no grounds for the cross appeal appear in appellee's brief, which concludes by urging that the judgment be affirmed. This leaves for

consideration the questions relating only to the judgment in favor of the Dwyers.

The northwest portion of the village is bounded on the west by the Kay farm, and on the north by Geneva Road which runs east and west. The Sevland tract lies on the north side of Geneva Road. The west corporate boundary of the village is about opposite the center of the south line of the Sevland tract, which is bounded on the west by Bloomingdale road. The Nelson tract lies immediately north of the Sevland tract, and is of the same width east and west. The Dwyer tract is immediately east of the Nelson tract, the south line of the two tracts being a straight line. South of the Dwyer tract is another tract of the same width east and west and extending south to Geneva Road, a distance of about sixty rods. The Kay farm is the highest point in the vicinity. From there the land slopes to the east and then north to the premises of the plaintiffs. There is a depression which starts some distance south of Geneva Road, running northerly to a culvert across the road, and from thence north-westerly through the tract south of the Dwyer premises, to the south-west corner of the latter, and then continues north-westerly through the Nelson tract, emerging on Bloomingdale Road. The water going down this depression eventually reaches the DuPage River. The lowest part of the Dwyer premises is in the south-west corner thereof. They installed a twelve-inch tile down the depression, on their land, and paid half the cost of the tile through the Nelson tract. They also had three other lines of tile on their tract, one along the south side, one through the center and one to the northeast. Prior to the paving of Kenilworth Avenue and the installation of the storm sewers herein-after mentioned this system of tile furnished adequate drainage for their premises so that no water stood thereon after a heavy rain. There is a well defined open ditch down the depression as far as the Dwyer land. The northwest portion of the village was formerly the Burrell farm, adjoining the east line of the Kay farm. Kenilworth

consideration the questions relating only to the land in town  
of the Dayers.

The northwest portion of the village is bounded on the west by

the Key farm, and on the north by General's road which runs to the west.  
The Dayer tract lies on the north side of the road.

The west corporate boundary of the village is about 1/2 mile from the center  
of the south line of the Dayer tract, which is bounded on the west  
by Hockingdale road. The Dayer tract lies between the north of the  
Dayer tract, and is of the same width east and west. The Dayer tract

is immediately east of the Dayer tract, the north line of the Dayer  
tract being a straight line. South of the Dayer tract is another tract

of the same width east and west and extending south to General's road, a  
distance of about sixty rods. The key farm is the highest point in the  
vicinity. From there the land rises to the east and south to the

premises of the Dayer tract. There is a depression which separates some  
distance south of General's road, running westerly to a culvert across the

road, and from thence north-westerly through the tract south of the  
Dayer premises, to the south-east corner of the Dayer tract, and then continues  
north-westerly through the Dayer tract, meeting on Hockingdale road.

The water going down this depression eventually reaches the Dayer River.  
The lowest part of the Dayer premises is on the north-west corner thereof.

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Burrell farm, adjoining the east line of the Key farm, Kenilworth



Avenue in the village runs north and south, intersecting the south side of Geneva Road at a point about two hundred feet west of the culvert mentioned. Elm Street, Oak Street, Marion Street and other streets run east from Kenilworth Avenue to Western Avenue, in the above order south of Geneva Road. There are no streets west of Kenilworth Avenue. There is a sanitary sewer on each of the above named east and west streets, connected to an eight inch sanitary sewer in Western Avenue. The flow of these Elm Street and Marion Street sewers is all to the east. On Oak Street the flow from the largest part of the sanitary sewer is to the west connecting with the sanitary sewer on Kenilworth Avenue. The flow from the east end of the Oak Street sewer goes east to Western Avenue. The sanitary sewer on Kenilworth Avenue starts at Geneva Road and the flow from that point is south to Elm Street. South of Elm Street the flow of the Kenilworth Avenue sanitary sewer is to the north, so that the Elm Street sanitary sewer is designed to take all the sewage from that neighborhood, except what goes east on Marion Street and the east end of Oak Street. The Elm Street sanitary sewer is a ten inch sewer. The Kenilworth Avenue sanitary sewer is a ten inch sewer north of Oak Street and eight inches south of Oak Street; and the west end of the Oak Street sanitary sewer is an eight inch sewer.

In 1926 the village paved Kenilworth Avenue to Geneva Road and installed storm sewers thereon connecting with storm sewers running east on Elm Street and Oak Street to points near the ditch mentioned, and on Marion Street and Linden Street short distances. The Kenilworth Avenue storm sewer in this vicinity is a ten inch sewer, and runs to a twenty inch sewer on the south side of Geneva Road, which runs east to the culvert about 200 feet distant. The storm sewers on the east and west streets are eight inch sewers.

At a high point on the Kay farm, outside the village corporate limits is a swampy depression, which filled with water in times of heavy rainfall.

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The storm sewers on the east and west streets are eight inch sewers. The culvert about 300 feet distant. The storm sewers on the south side of Geneva Road, which runs east to Avenue storm sewer in this vicinity is a ten inch sewer, and runs to a and on Marion Street and Linden Street short distance. The Kenilworth east on Elm Street and Oak Street to points near the ditch mentioned, installed storm sewers thereon connecting with storm sewers running in 1926 the village paved Kenilworth Avenue to Geneva Road and is an eight inch sewer.

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The evidence shows that when the water in it reached a certain level it would flow west. Some years before the Burrell farm was taken into the village, a tile drain was installed leading from the depression across the Burrell farm across what is now Kenilworth Avenue, diagonally to the northeast, and ending so that the water found its way into the north and south ditch near Oak Street. When Kenilworth Avenue was paved the village connected this tile to the storm sewer on Kenilworth Avenue on the west side thereof.

One of the claims of the Dwyers is that prior to the paving of Kenilworth Avenue and the installing of the storm sewers mentioned, the water from the Northwest part of the village, including the water from the Kay farm, found its way to the ditch south of Geneva Road and thence through the culvert on down the ditch northwesterly; that a large part of the water was absorbed by sub-surface drainage, and their land was never flooded; that since the paving and storm sewers were installed, the water comes north on Kenilworth Avenue in such volume and force that it crosses Geneva Road at that point, and goes north to a point on the ditch about fifty feet south of the south line of the Dwyer tract, where it formed a whirlpool, cut away and around a ridge, washed out, broke and stopped the tile drain from thereon and made a lake of about five acres in the southwest corner of the Dwyer land. The evidence shows that the center of Geneva Road is about a foot higher than the north end of the pavement on Kenilworth Avenue. Another claim of the Dwyers is that in time of heavy rain, the sewage from the sanitary sewer system gets into the storm water system, and that feces and other offensive sewage comes down onto their premises with the flood water, causing additional damages.

The evidence shows that since the pavement and storm sewers were installed, in heavy rains a part of the water cuts across Geneva Road at the end of Kenilworth Avenue and goes directly north as claimed by the Dwyers, and has eroded a considerable part of the southwest corner of



their land; and that by the tile being washed out, broken and stopped up, the water stands on about five acres to a depth of from two to three feet and stays there sometimes from two to three months. It also shows that on several occasions the manhole cover on the storm sewer at the north end of Kenilworth Avenue has been forced off by the excessive flow of the water, which spouts out of the sewer.

Dwyer testified that since the storm sewers were installed he had replaced the tile on their premises eight or ten times. The evidence also shows that on two occasions the village has done the same thing and furnished new tile to replace the broken sections.

The former personnel director of the village, who acted in an advisory capacity on the sanitary sewers and the water system testified that when he received complaints as to the condition on the Dwyer property he and the superintendent of the water system found that two sloughs between Elm and Oak Streets connected with the sanitary sewer system and caused trouble about a mile away; that they connected the sanitary sewer into the storm sewer; that he had the material delivered and the water superintendent reported to him that the connection was made about three hundred feet east of Kenilworth and Oak, and that by taking the sanitary sewage on Oak Street back to Kenilworth Avenue, it goes onto the Dwyer property. He testified on cross examination that he did not see the work being done in installing the connection between the two sewer systems.

Allan A. Myers, the former president of the village, who lives on the southeast corner of Kenilworth Avenue and Geneva Road, testified his laundry tub, sink and toilet in the basement were connected with the Kenilworth Avenue sewer, and that his drain is connected into the ditch that runs into Geneva Road. That at different times in heavy rains, water, toilet paper and feces came into his basement through the drains, laundry tub and toilet, two or three times a year, varying in depth of from one

their land; and that by the tide being washed out, broken and torn up, the water stands on about five acres to a depth of from two to three feet and stays there sometimes from two to three months. It also shows that on several occasions the manholes cover on the storm sewer at the north end of Kenilworth Avenue has been forced off by the excessive flow of the water, which spouts out of the sewer.

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to three feet; that it did not happen prior to the time he installed the toilet, and has not occurred within the last year or so.

A witness who lives on the south side of Geneva Road, east of the depression, testified his sewer runs south into the Elm Street sanitary sewer; that about twice a year the sewer backed up and sewage came into his basement; that on these occasions he broke his sewer about one hundred feet south of Geneva Road and relieved the pressure by letting the sanitary sewage run into the natural water course west of his house. He further testified that on the property across the road from his house there is an old fashioned cess pool, and he had noticed water shooting up from the tile south of the cess pool.

The municipal engineer who had charge of the construction of the pavement, the storm sewers and the sanitary sewers, testified the elevation of the sanitary sewer is below that of the storm sewer, detailing the difference in elevation at various points. At Kenilworth Avenue and Geneva Road the elevation of the sanitary sewer is 3/10 of a foot below that of the storm sewer. His son, and the superintendent of water and the sanitary sewers, testified they made tests to determine whether there was any connection between the sanitary and storm sewers, by closing the storm sewer at Kenilworth Avenue and Oak Street, flooding the pavement, and putting bluing into the storm sewer; and that they found no bluing in the effluent of the sanitary sewer but found it in the storm sewer.

It is common knowledge that sanitary sewer systems are sealed so that ground water does not ordinarily enter them, except slight infiltration by leaky joints. There is no testimony in this case to show it was sufficient in this case to cause flooding of the sanitary sewer in time of a heavy rain. Considering the testimony of the former personnel director that the two systems were connected together, and the

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A witness who lives on the south side of Geneva Road, east of the depression, testified that when he was running into the Elm Street sanitary sewer; that about twice a year the sewer backed up and sewage came into his basement; that on these occasions he broke his sewer about one hundred feet south of Geneva Road and relieved the pressure by letting the sanitary sewage run into the natural water course west of his house.

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backing of the sewage into the two basements mentioned, together with the fact that the storm water sewer on Kenilworth Avenue was of such volume that it threw the cover off the mahole opposite the Myers house, the evidence shows the sewage from the sanitary sewer system was getting into the storm water sewer, and found its way down Kenilworth Avenue onto the Dwyer place, as the water raced north across Geneva Road.

The well settled rule is that the owner of a higher tract of land has the right to have the surface water falling or naturally coming upon his premises by rains or melting snow pass off through the natural drains upon or over the lower or servient lands, and the right to drain his own land into the channel which nature has provided, even if the quantity of the water is thereby increased. (People ex rel. Paeler v. Chicago and Eastern Illinois Railroad Co., 262 Ill. 492; Lambert v. Alcorn, 144 Ill. 313; Ribordy v. Murray, 177 id. 134; Pinkstaff v. Steffy, 216 id. 406; Robb v. Village of LaGrange, 158 id. 21.) The same doctrine applies to a municipality having a dominant estate, so long as it does not cast sewage upon the servient estate. (Crane v. Village of Roselle, 236 Ill. 97; ~~Robb~~ v. Village of LaGrange, supra.) It is also the law that no landowner or proprietor of a dominant estate has any right to divert surface waters or flow of watercourses from their natural channel and thereby overflow land of another without compensating him for damages resulting from overflow; and the fact that waters diverted from the natural course so that they overflow the land of another are first conducted into a natural water course leading to or through lands damaged will not relieve the party causing the diversion from liability therefor if the waters cause the natural watercourse to overflow its banks to the damage of another landowner. (Eimers v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co., 158 Ill. App. 557.)

The contour map introduced in evidence by the appellant shows that



the entire northwest portion of the village north of Oak Street declines east to the depression and ditch lying south of the culvert. From the culvert north the decline of the land is toward the north. While the village did not install the tile from the Kay farm, it did connect the tile into the Kenilworth Avenue sewer, diverting the flow of it from its natural course into the depression. All this water from Kenilworth Avenue north of Oak Street, and from the west portions of the cross streets mentioned and the Kay farm tile is sent north down Kenilworth Avenue out of its natural course, which is to the east. Inasmuch as the evidence shows the Dwyer land was never flooded prior to the installing of the pavement and the sewers, it is apparent that they are the cause of the flooding. The volume of the water is so great that neither the sewer on Kenilworth Avenue nor the twenty inch sewer of Geneva Road will carry it, and a large part of it cuts across the road and the intervening tract onto the Dwyer land with such force as to cause the damages complained of. In such a case the owner of the servient estate is entitled to recover. (Hicks v. Silliman, 93 Ill. 255.) Appellant is mistaken in the assumption that the Dwyer claim is based only on acceleration. It embraces damages from water diverted from its natural course.

Whenever a municipality diverts the flow of water from its natural course, it is liable for damages to the servient estate. (City of Bloomington v. Brokaw, 77 Ill. 194; Nevins v. City of Peoria, 41 id. 502; City of Aurora v. Gillett, 56 id. 132; City of Aurora v. Reed, 57 id. 29.) In City of Elgin v. Kimball, 90 Ill. 356, the court held that where the city raised the grade of a street and constructed sewers for the purpose of carrying off surface water in such an imperfect manner that the water was turned into a basement of a building on the street, the city was liable for such damages as arose from the defective improvement.

the entire surface of the lot, and the water from the natural  
 bedlines and to the lot owner and the lot owner is not liable.  
 From the surface water the bedlines of the lot are not liable.  
 While the water is not liable for the lot owner, it is  
 connect the lot from the lot owner, and the lot owner is  
 flow of it from the natural course into the lot owner's lot.  
 water from the lot owner's lot, and the lot owner is not  
 portions of the lot owner's lot, and the lot owner is not  
 north from the lot owner's lot, and the lot owner is not  
 east. If the lot owner's lot is not liable for the lot owner  
 prior to the installation of the sewer, it is not liable  
 that they are the cause of the flooding. The volume of the water is  
 so great that it is not liable for the lot owner's lot.  
 inch or less of water will cause it, and the lot owner is not  
 across the road and the lot owner is not liable for the lot owner's  
 force as to cause the damage to the lot owner's lot.  
 the servant's estate is entitled to recover. (City of Chicago v. Illinois, 33 Ill.  
 355.) The lot owner is not liable for the damage to the lot owner's lot  
 based only on speculation. It is not liable for the damage to the lot owner's lot  
 from its natural course.  
 However, a municipality is liable for the flow of water from its natural  
 course, it is liable for damages to the lot owner's lot. (City of Chicago  
 v. Illinois, 33 Ill. 355; City of Chicago v. Illinois, 33 Ill. 355; City  
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 city raised the grade of a street and constructed a sewer for the purpose  
 of carrying off surface water in such an improved manner that the water  
 was turned into a basement of a building on the street, the city was  
 liable for such damages as were caused by the defective improvement.

The evidence shows the tile drains on the Dwyer place cost about \$550.00, and that Dwyer paid half the cost of the tile across the Nelson tract, besides paying a dollar an hour to laborers repairing the drains, as well as working himself, and that it took three or four days at a time when repairs were made. There is evidence that a vegetable crop lost by a tenant from the flooding of the land in 1936 was worth \$1500.00. Dwyer had an interest in the crop, the extent of which was not shown. Prior to the installation of the pavement and sewers he hired the work to be done by other farmers. It is a matter of common knowledge that farm land rented on a crop sharing plan is customarily rented for not less than one-third of the crop, and if rented for cash it is usually intended to realize as much for the landlord as on the crop sharing plan. Thus the court had a foundation for an estimate of the value of the crop losses to the Dwyers since the pavement and sewers were installed. That the sewage coming onto the premises was an element of damages is apparent, but there was no testimony as to the amount thereof and the trial court did not include it in his calculations. The erosion and the flooding of the land is of course a damage to it. While there is no specific testimony as to the amount of the damage on this account, the proof as to the value of the tile, the labor and the crop losses is sufficient to sustain the judgment for \$1350.00, and it is accordingly affirmed.

Judgment affirmed.

The evidence shows the tide draining on the Taylor estate cost about \$250.00, and that Taylor paid half the cost of the tide drains the Nelson tract, besides paying a dollar a foot to laborers working the drains, as well as working himself, and that it took three or four days at a time when repairs were made. There is evidence that a vegetable crop lost by overflow from the flooding of the land in 1930 was worth \$150.00. Taylor had an interest in the crop, the extent of which was not known. Prior to the installation of the government and sewers he hired the work to be done by other farmers. It is a matter of common knowledge that farm land rented on a crop sharing plan is customarily rented for not less than one-third of the crop, and is rented for cash it is usually intended to realize as much for the landlord as on the crop sharing plan. Thus the court had a foundation for an estimate of the value of the crop losses to the Taylors since the government and sewers were installed. If the average amount paid the premises was an element of damages in payment, but there was no testimony as to the amount thereof and the trial court did not include it in its calculations. The erosion and the flooding of the land is of course a damage to it. While there is no specific testimony as to the amount of the damage on this account, the proof as to the value of the tide, the labor and the crop losses is sufficient to sustain the judgment for \$1350.00, and it is accordingly affirmed.

Judgment affirmed.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

FEBRUARY TERM, 1942

FLORENCE HOPPER,  
Appellee

vs.

EDWARD HOPPER,  
Appellant

APPEAL FROM  
CIRCUIT COURT OF  
KANKAKEE COUNTY.

314 I.A. 572<sup>2</sup>

DOVE, J.:

Appellant seeks reversal of a decree of the circuit court of Kankakee County in a separate maintenance proceeding, whereby the court awarded appellee, his wife, \$660.00 per annum, payable in monthly installments of \$55.00 each, and the household goods and furniture subject to an indebtedness of \$120.00, which he was ordered to pay. Appellant was also ordered to pay appellee \$100.00 as and for her solicitor's fee, and all the debts of a tavern and restaurant known as the "Valencia".

The parties were married on November 23, 1920, and lived together as husband and wife until July 9, 1940. They have a son, nineteen years of age, residing with appellee, and a married daughter, seventeen years of age, who lives with her husband. Appellant is an employee of the Public Service Company of Northern Illinois, at Kankakee, and receives a salary of \$170.00 per month. At the time of the separation they lived in a rented house. Appellee, who is in possession of the furniture and furnishings, remained there and claims





the furniture and furnishings, as well as half of an automobile, the title to which was in appellant's name, and which was in his possession and afterwards disposed of by him.

The complaint alleges that appellant, without any just cause whatsoever, abandoned appellee on July 9, 1940; that she has no means of support or income other than what she may receive from appellant; that as a result of child bearing she has been for many years subject to various ills and is still in need of medical attention and several operations; that during their married life she faithfully discharged her duties as a wife and treated appellant with kindness and forbearance; that the son is unemployed and unable to find work; that for approximately one year prior to the alleged abandonment, the parties conducted the Valencia; that the license was in her name because appellant claimed that if it was in his name it would jeopardize his position with his employer, but that in fact the business was as much the property of appellant as of appellee; that when appellant abandoned appellee he also abandoned the business, and appellee was obliged to sacrifice it <sup>leaving it</sup> with an indebtedness of approximately \$1000.00 which ~~she~~ <sup>appellant</sup> should be compelled to pay.

The answer traverses these allegations seriatim, except the allegation that appellee has no means of support or income, which thus stands admitted. It alleges the Valencia was entirely the enterprise of appellee, and denies liability for any of its debts, or that appellee is entitled to the furniture, a half interest in the automobile, or to separate maintenance or any other relief.

The first ground urged for reversal is that appellee was guilty of such misconduct as contributed materially to the disruption, and that therefore, she is not within the terms of the statute (Ill. Rev. Stat. 1941, chap. 68, par. 23) which provides for separate maintenance of spouses "who without their fault, now live, or hereafter may live separate and apart from their wives or husbands."



When appellant left appellee, he left a note reading:

"Flo: Blame yourself for this, this has been working on me for years and now I just can't bear to come home so I am going out of town for a few days. So don't bother to look for me, just leave me alone and we will both be better off. I will keep the car and you have everything else. Ed."

The testimony shows appellee worked in the Valencia kitchen and as a waitress. She testified that on the day appellant left, the children took her home about midnight, and her son-in-law found the note on the bed; that appellant's clothes were gone, and when she called him by tele-phone asking him to help straighten out the tavern business he refused to do so; and she was forced out of business when some other people bought the place; that when she and appellant took on the Valencia it was taken in her name because appellant did not want it to interfere with his job; that appellant hired the bar-tender, and they both paid his wages and the other current bills; that appellant worked there one morning each week, and both of them took money out of the business.

Benny Casino, the bar-tender, testified that appellee drank on occasions and he had seen her drink to the point of becoming intoxicated; that on one occasion he saw her sitting at the bar with some truck drivers and that she was in a "bad way"; that she was intoxicated, and would start drinking whenever these particular truck drivers came; that another time he saw her when she had been drinking and could not walk straight; that she danced in the middle of the floor on Saturday nights, and when anybody was there she would do a dance with them; that she would take a shawl and go around shaking herself and her feet in the air; that she raised her dress and kicked up her feet; that she kicked straight out in front of her; that he had heard her curse appellant, using profane words and rather bad language; that on some occasions she accused him of associating with lewd women, and that appellant would just walk away; that on Saturday nights a number of

Then appellant left appellant, he left a note saying:  
"Wife: Please yourself for this, this is for you, I am  
for years and now I just can't bear it, I am  
I am going out of town for a few days, I will  
to look for me, just leave me alone and I will  
better off. I will keep the car and you have everything  
else, etc."

The testimony shows appellant worked in the restaurant  
and as a waitress. The testimony that on the day appellant left,  
the children took her home about midnight, and she was found  
the note on the bed; that she had a clothes box, and when  
she called him by telephone he told her to come out the  
tavern business he wanted to go to; and she was forced out of  
business when some other woman had the right; that when she  
appellant took of the business it was taken in her name because ap-  
and did of what is to be done with the job; that appellant hired  
the bar-tender, and they both told his wife and the other current  
billie; that appellant worked there for many years, and both  
of them took money out of the business.

Henry Geline, the bar-tender, testified that he knew  
occasionally and he had been in the house of appellant's  
dated; that on one occasion he saw her sitting at the bar with some  
truck drivers and that she was in "good luck"; that she was in-  
dated, and would start drinking, Henry Geline testified a truck driver  
came; that another time he was in the house and had been drinking and could  
not walk straight; that she danced in the middle of the floor on Sat-  
day nights, and when anybody was there she would go to a dance with them;  
that she would take a drink and go around making herself and her feet  
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appellant, using profane words and rather bad language; that on some  
occasions she counsed him of associating with bad women, and that ap-  
pellant would just walk away; that on Saturday nights a number of

friends of the parties came there; that they had a floor show with an orchestra and singing and dancing; that appellee had a good voice and sang and danced sometimes; that she would drink with customers and sometimes asked the witness not to give her a full drink. He concluded his cross-examination with the statement that he did not want to give the court the impression that she was in the habit of drinking to excess.

Appellee denied ever cursing appellant in the place of business or ever dancing and throwing her legs in the air; she testified she did drink with men customers when she was tending bar if they bought her drinks; but she did not believe she ever drank to the extent of becoming intoxicated; she denied she allowed men to become unduly familiar with her, but allowed them to put their hands on her shoulder, but nowhere else.

While appellant denied the Valencia was his, he testified he procured a loan from one of his friends to buy it, although a friend of appellee offered to lend her the money; that the trouble with his wife started a few days after they were married; that sometimes she drank moderately and sometimes too much; that he left her because of these things, and because he was cursed and wrongfully accused during their entire married life. He said the most serious arguments they had started when appellee wanted to give up the Valencia and he insisted on keeping it. He admitted that when his wife and her sister accused him at the plant about 10:30 or 11:00 o'clock one night of being out with another woman, the woman was back in the plant, and that he had been out in the car with her. Appellee's sister testified they caught appellant with a woman whom she saw in his car; that about five years ago she heard appellee and appellant have an argument, when he wanted to be ~~more~~ <sup>that appellant then</sup> more protective to the other woman; ~~he~~ <sup>she</sup> said he intended to turn over a new leaf. He did not deny this.

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turn over a new leaf. He did not deny this.

Appellant testified that sometimes the family arguments might have been his fault and sometimes hers, and that perhaps they were a fifty-fifty proposition; and that he might have cursed her when she cursed him; that if it were not for the children he would have left her long ago, and had told her that when they were grown he was going to leave; and that about a week after he left he abandoned the business and paid some of the bills.

The cashier and waitress at the Valencia testified appellee worked there as a cook and waitress, and <sup>as</sup> a bar-tender <sup>she</sup> took care of the bar; that appellant also worked at the bar and took the money away at night and brought it back in the morning; that she never saw anything wrong with appellee's conduct and never saw her dance on the floor and throw her legs in the air, or curse appellant.

Della Sharp testified that in November, 1940, appellant came to see her about renting a house, telling her he expected to get a divorce right away and marry another woman she named. That he did not rent the house, but the lady and her brother did, and she saw appellant there afterward on several occasions.

Elizabeth Mann testified she had known appellee seven years and that she had a reputation for being a woman of good character and behavior; that she and appellee had taken a few drinks together.

The testimony conclusively shows that the Valencia was as much the property of appellant as it was of appellee. He was willing that his wife should work there. His conduct justified her accusations of infidelity. Conceding that she drank and danced in the Valencia, there is no testimony that tends to show her conduct was lascivious or below the standard of such places or that appellant ever objected to it. While the so-called "Bohemian" free and easy atmosphere of such places is not in keeping with good morals and ideals, appellant, being engaged in the business, is in no position to now complain of his wife's conduct.





There is no testimony that tends to show it materially contributed to the disruption. The testimony as to her reputation as a woman of good character stands uncontradicted. On the other hand there is evidence that tends to show he left her on account of another woman. If she publicly upbraided him for his philandering, it is not surprising that her environment, in which he acquiesced, might induce strong language compatible with their mode of living. Under the evidence appellee has made out a case within the purview of the statute.

However, we find no evidence in the record that justifies those parts of the decree awarding the title to the furniture and furnishings to appellee, and requiring appellant to pay the indebtedness against it and the obligations of the Valencia. The law is that if either or both of the parties have equitable rights in property, other than through the marriage relation, by reason of having purchased or contributed to the purchase or accumulation thereof, the court may decree equities to both in such property or award it to the one who purchased it outright or award other property in lieu thereof. If the wife has no claim for separate maintenance or alimony except the existence of the marriage relation and the husband's fault, an allowance should be paid in money at stated intervals. (Decker v. Decker, 279 Ill. 300.) There is no showing in this case that appellee had any claim for separate maintenance except the marriage relation and the husband's fault. While it may be that under section 44 of the Civil Practice Act and rules 10 and 11 of the Supreme Court, separate causes of action may be joined (Glennon v. Glennon, 299 Ill. App. 13) yet in order to recover in such a case it is necessary to make proofs that will justify the decree entered. Although the complaint in this case asks that appellee be awarded the furniture and furnishings, and that appellant be required to pay the indebtedness against it and the debts of the Valencia, there

There is no testimony that tends to show it was actually contributed to the distribution. The testimony as to her reputation as a woman of good character stands uncontradicted. On the other hand there is evidence that tends to show he had an account of another woman. It was publicly reported that he was having an affair with a woman. It is not surprising that her environment, in which he lived, might induce strong language comparable with that of a living. Under the evidence appellee has made out a case within the purview of the statute.

However, we find no evidence in the record that justifies those parts of the decree awarding the title to the furniture and furnishings to appellee, and requiring appellee to pay the indebtedness against it and the obligation of the Valenciano. The decree is either on both of the parties have equitable rights in property, either then through the marriage relation, by reason of having purchased or contributed to the purchase or acquisition thereof, the equity may be asserted to both in such property or to the one who purchased it outright or award other property to the other. If the wife has no claim for separate maintenance or alimony except the existence of the marriage relation and the husband's duty, an allowance would be paid in money at stated intervals. (See *Wells v. Wells*, 276 Ill. 500.) There is no showing in this case that appellee is any claim for separate maintenance except the marriage relation and the husband's duty. While it may be that under section 44 of the Civil Practice Act and rules 10 and 11 of the Supreme Court, separate causes of action may be joined (*Glenn v. Glenn*, 298 Ill. 44, 13) yet it does not recover in such a case it is necessary to make pleadings that will justify the decree entered. Although the complaint in this case sets forth appellee as awarded the furniture and furnishings, and that appellee is required to pay the indebtedness against it and the decree of the Valenciano, there

is no testimony that shows appellee bought or contributed to the purchase of the furniture or furnishings with her own means or that she had any rights therein except through the marriage relation. Her testimony shows that appellant was not the sole owner of the Valencia, and it is not claimed the debts of that business were incurred by him any more than by her. The ownership and operation of that business and its obligations are matters wholly unrelated to the statutory objects and purposes of a proceeding for separate maintenance. No reason is shown why appellant should be required to pay its entire indebtedness. The fact that he is liable for appellee's separate maintenance is not a reason why he should be required to assume her part of the obligations of an unrelated business venture. There is no testimony which shows any reason why he should be divested of his title to the furniture and furnishings or required to pay the debt against it. Without evidence to sustain a decree it cannot stand. The award as to the furniture and furnishings should have been confined to the use thereof.

No testimony was heard as to the value of the services of appellee's solicitor. In such a case it is error to make an allowance for solicitor's fees. (*Matheny v. Bohn*, 164 Ill. 495; *Cash v. Cash*, 130 Ill. App. 51.)

That part of the decree awarding appellee separate maintenance is affirmed. Those portions of it awarding appellee title to the furniture and furnishings, and ordering appellant to pay the indebtedness thereof and the debts of the Valencia, and appellee's solicitor's fee are reversed, and the cause is remanded with directions to take such

further steps as are in harmony with the views herein expressed. *Each party to pay one-half the costs in this court.*

Reversed in part and remanded with directions.



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

FEBRUARY TERM, A. D. 1942

HIRSH E. TODD,

Appellee

vs.

CHARLES P. GREEN,

Appellant

APPEAL FROM

CIRCUIT COURT OF

MARSHALL COUNTY.

314 I.A. 573

DOVE, J.:

This is an appeal from a summary judgment of the circuit court of Marshall County against appellant in a forcible detainer proceeding, awarding appellee possession of certain hotel premises and its furnishings in the City of Henry. Procedural rulings are also complained of. On the oral argument in this court appellee abandoned a cross appeal on the failure of the trial court to allow him double rent for alleged willful holding over.

It appears from the complaint and exhibits that appellant was a tenant of the hotel and the furnishings, under a five year lease between appellee and C. J. Turpen, expiring August 9, 1940; that appellant was assignee of Turpen and held over, paying rent, thereby creating a tenancy from year to year; that on May 21, 1941, appellee mailed appellant a written notice terminating the tenancy at the end of the tenancy year, and that appellant acknowledged in writing the receipt of a copy of the notice. The complaint alleges that, relying upon surrender of possession

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by appellant pursuant to such notice, appellee made commitment for possession, and that he suffered damages on account of the wrongful withholding.

The motion for summary judgment was supported by an affidavit of appellee's counsel alleging personal knowledge of and that he could testify to the facts alleged in the complaint; that affiant had personally engaged in almost all the negotiations leading up to the execution of the lease and the assignment thereof, and had acted as agent for appellee at all times in dealings with appellant; that appellant never claimed to affiant any interest in or right to possession of the premises or the chattel property except as tenant under the assignment of the lease or as tenant from year to year after its expiration date; that on May 22, 1941, affiant caused to be served upon appellant a notice of the termination of tenancy and that appellant endorsed his receipt for the same upon the original copy of the notice; that thereafter appellant gave no notice of claim of interest in the premises except to tender a check for \$100.00, stated by appellant to be for payment of rent to September 15, 1941, which check was returned by affiant; that appellant in several communications to affiant and in all things prior to the termination of the tenancy on August 8 or 16, 1941, led affiant to believe possession of the premises and the chattel property would be surrendered peaceably upon the expiration of the term in accordance with the notice of termination; that in reliance upon surrender by appellant pursuant to such notice, appellee made a commitment for possession to commence upon the expiration of the time pursuant to the notice, and that appellant had full notice and knowledge of the commitment.

Appellant filed a motion to dismiss the complaint on the grounds that it stated conclusions, not facts; that it failed to state a cause of action; and that appellee was without authority to prosecute the suit.





An additional affidavit by appellee's counsel in support of the motion for summary judgment alleges that the copy of the instrument thereto attached is a true copy of an agreement entered into on January 31, 1941, between appellee and C. L. Hughes, agent; that the contract being silent as to the right of possession as between the parties thereto, it was verbally agreed between the affiant and C.L. Hughes, agent as aforesaid, that appellee should retain his reversionary right to possession until actual possession was obtained by him, and that then appellee should deliver possession to Hughes, agent as aforesaid. The terms of the contract, as shown by the copy, are that if Hughes shall first make the payments and perform the covenants hereinafter contained, appellee agrees to convey the premises and the chattels therein owned by him to Hughes for the price of \$20,000.00 of which \$1000.00 was paid down. \$500.00 additional was to be paid when actual possession was delivered; the remainder to be paid in installments of \$75.00 or more per month, beginning on the first day of the month following the date actual possession was given. The contract provides that Hughes was to be credited with one-twelfth of the 1941 taxes for each month until actual possession was delivered, and that appellee was to give notice cancelling the lease and take such steps as were necessary to remove appellant as tenant.

Appellant filed a counter-affidavit to the motion for summary judgment, in which he denies being personally served with notice of the termination of the lease, and alleges the service was by mail. The affidavit does not deny receipting for a copy of the notice endorsed upon the original. It denies he gave no notice of claim of interest; alleges large expenditures in cleaning and improving the premises at appellee's request and by his consent; that appellee does not own the



property, but holds title as trustee for the benefit of the original bondholders under a foreclosure, and has no legal right to prosecute the suit without their written direction, and that they are necessary parties. That under the contract of appellee with Hughes as agent, the persons for whom Hughes purported to act are the equitable owners and the only persons entitled to possession; that Hughes is insolvent and has no property out of which an execution could be satisfied, and is a "mere alleged promoter"; that Hughes attempted to form a corporation in connection with the purchase of the property, and affiant is informed and believes all the stock, except two shares, was issued to Hughes; and that Hughes is the principal and in fact the only person entitled to possession; that ever since the date of the contract between Hughes and appellee, Hughes had been negotiating for the purchase of appellant's equipment in the premises, and that they had agreed that appellant should have possession of the premises until January 1, 1941, and that on or before that date Hughes would purchase appellant's equipment except that of the kitchen and tap room which appellant was to retain; that Hughes has proven to be irresponsible and not a man of his word, and has misled appellant in all of such transactions; that all of the same were known at the time to appellee and his agent. The affidavit concludes by demanding a jury trial. A separate demand for jury trial was also filed.

Appellant's motion for leave to amend instant his motion to dismiss, his motion for leave to present oral testimony in support of the motion to dismiss, and the motion to dismiss, were denied. Leave to answer was granted. His motion for leave to file within ten days cross-affidavits to the motion for summary judgment was denied. Answer was filed, alleging service of notice of termination of tenancy was insufficient, not meeting the requirements of the statute; denying wrongfully withholding possession; and alleging Hughes is the only person entitled to possession; and denies



appellee relied upon surrender of possession and that he has suffered damages. No evidence was heard, and the court entered summary judgment in favor of appellee for possession.

Appellant's brief states that in accordance with his contract with Hughes he surrendered possession of the premises on December 31, 1941, and that Hughes is in possession. The issue as to double rent being out of the case, it is apparent that the only remaining interest of either party would be the question of costs. The rule is well settled that the existence of an actual controversy is an essential requisite to appellate jurisdiction, and a reviewing court will dismiss an appeal where facts are disclosed which show that such a controversy does not exist, even though such facts do not appear of record. When there is no real present question involving actual interests and rights for a reviewing court to consider, the court should not be compelled to review a cause merely for the purpose of determining who ought to pay the costs of the suit or to establish a precedent. (*Chaitlen v. Caspar American State Bank*, 372 Ill. 83; *Wick v. Chicago Telephone Co.*, 277 id. 338; *People v. Sweitzer*, 329 id. 380.) Under these authorities, the appeal is dismissed.

Appeal dismissed.



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

FEBRUARY Term, A. D. 1948

THE PEOPLE OF THE STATE  
OF ILLINOIS, ex rel  
WITLY Z. MITCHELL,

APPELLANT

vs.

OTTO W. ARPSBACH, as President  
of the Village of Villa Park, et al.,

APPELLEES

APPEAL FROM  
CIRCUIT COURT  
OF DuPAGE COUNTY.

314 I.A. 373<sup>2</sup>

DOVE, J.:

Relator filed a petition in the circuit court of DuPage County for a writ of mandamus commanding the fire<sup>and</sup> police commissioners of the Village of Villa Park to reinstate relator to the position or office of chief of police, or as a member of the police department, commanding the president, trustees and clerk to issue to him warrants for his salary as chief of police, or as a member of the police department, from May 13, 1941 and commanding the village treasurer to honor and pay such warrants on presentation. The respondents filed a motion to dismiss which, upon a hearing, was sustained, and the suit was dismissed at the costs of the relator. To reverse that judgment this appeal has been prosecuted.

The petition, after formal allegations as to the parties, sets out village ordinance No. 247 of the year 1928, establishing a department of police, providing by section 8 for a police committee to

IN THE

STATE COURT OF ILLINOIS

IN AND FOR THE COUNTY OF DUKE

WILLIAM A. DOWD, Plaintiff,

THE PEOPLE OF THE STATE  
OF ILLINOIS, ex rel  
WINNY A. MICHAEL,

Defendant.

vs.

OF DUKE COUNTY.

OTTO E. ARNO, JR., President  
of the Village of Villa Park, et al.,

Defendants.

3141.A. 573

DOVE, J.

Relator filed a petition in the circuit court of DuPage County for a writ of mandamus commanding the five police commissioners of the Village of Villa Park to reinstate relator to the position of chief of police, or as a member of the police department, commanding the president, trustees and clerk to issue to him warrants for his salary as chief of police, or as a member of the police department, from May 13, 1941 and commanding the village treasurer to honor and pay such warrants on presentation. The respondents filed a motion to dismiss which, upon a hearing, was sustained, and the suit was dismissed at the costs of the relator. To reverse that judgment this appeal has been prosecuted.

The petition, after formal allegations as to the parties, sets out village ordinance No. 247 of the year 1938, establishing a department of police, providing by section 3 for a police committee to



supervise and control, with the president, the police department, and creating the offices of a chief of police, a captain of police, a desk sergeant "and as many patrolmen as necessary." The petition also alleges that ordinance No. 382 of April 30, 1937 amended section 8 of ordinance No. 247, by providing for suspension of members of the police department by the chief of police or the village president; and sets forth ordinance No. 408 of February 24, 1938, which created the office of commissioner of police, with control of the police department, subject to supervision of the president of the board of trustees.

The petition then alleges the adoption of the Fire and Police Commissioners act (Ill. Rev. Stat. 1939, chap. 24, par. 843, et seq.) at the annual village election of village officials on April 15, 1941, and the subsequent appointment by the village president of three of the respondents, who qualified and still act as members of the board of fire and police commissioners. The pertinent provisions of section 11, specially relied upon for reversal, as in force during the period in controversy, are:

"No officer or member of the fire or police department of any such city, village or incorporated town, who shall have been such for more than one year prior to the adoption of this Act, by such city, village or incorporated town, \*\*\*, shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense. Such charges shall be investigated by such Board of Fire and Police Commissioners, and in case such officer or member be found guilty, such board may remove or discharge him, or may suspend him not exceeding ten days without pay.\*\*\*.

The term officer or member of the fire or police department of such city, village or incorporated town as used herein shall include all officers and members of the fire and police departments of such cities, villages or incorporated towns who shall have been employed as regular members of such fire or police department for more than one year. Such regular employment for more than one year shall constitute such officers or members city officers."

It is then alleged:

"That relator has been a regular member of the Police Department of the Village of Villa Park since August 15th, 1939, having been appointed on that date acting Chief of Police by George A. Olson, F.W. Hartman and R. K. Butts, the Police Committee of the Board of Trustees of Villa Park; that Relator's appointment to said office or position was made in writing and is in words and figures as follows, to-wit:

supervise and control, with the president, the police department, and creating the office of a chief of police, and in 1911, the petition also alleges that ordinance No. 338 of April 10, 1911, amended section 8 of ordinance No. 347, by providing for suspension of members of the police department by the chief of police or the village president; and sets forth ordinance No. 408 of February 24, 1915, which created the office of commissioner of police, with control of the police department, subject to supervision of the president of the board of trustees.

The petition then alleges the adoption of the fire and police commissioners act (Ill. Rev. Stat. 1905, chap. 84, par. 343, et seq.) at the annual village election of village officials on April 15, 1911, and the subsequent appointment by the village president of three of the respondents, who qualified and still act as members of the board of fire and police commissioners. The petition alleges the period of 11, especially relied upon for reversal, as in force during the period in controversy, are:

"No officer or member of the fire or police department of any such city, village or incorporated town, who shall have been such for more than one year prior to the adoption of this act, in such city, village or incorporated town, \*\*\* shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense. Such charges shall be investigated by such Board of Fire and Police Commissioners, and in case such officer or member be found guilty, such board may remove or discharge him, or may suspend him not exceeding ten days without pay.\*\*\*"

The term officer or member of the fire or police department of such city, village or incorporated town as used herein shall include all officers and members of the fire and police departments of such cities, villages or incorporated towns who shall have been employed as regular members of such fire or police department for more than one year. Such regular employment for more than one year shall constitute such officers or members city officers."

It is then alleged:

"That relator has been a regular member of the Police Department of the Village of Villa Park since August 18th, 1934, having been appointed on that date acting Chief of Police by George A. Olson, F. Hartman and R. K. Bitts, the Police Committee of the Board of Trustees of Villa Park; that Relator's appointment to said office or position was made in writing and is in words and figures as follows, to-wit:

'The Committee has appointed Officer Mitchell as Acting Chief of Police and recommends that his compensation be increased to \$165.00 per month while he is serving in this capacity. The Committee trusts that this action meets with your approval. Respectfully submitted, George A. Olson, Chairman, F. A. Hartman, Member, R. K. Butts, Member.'

It is further alleged that on the same day, at a regular meeting of the board of trustees, relator's salary as acting chief of police was fixed at \$165.00 per month, quoting minutes of the meeting as follows:

"President Murphy entertained a motion that Mr. Mitchell, after action by the Police Committee, receive \$165.00 per month while serving as Acting Chief of Police, motion carried unanimously on a roll call vote."

Then follows an allegation "that on February 19, 1940, after relator had served his probationary period of six months, the Police Committee constituted as aforesaid recommended to the President and Board of Trustees the appointment of relator as Chief of Police of the Village", and sent a letter to this effect to the president, which, omitting the address and signatures, reads:

"At a meeting of the Police Committee held February 18, 1940, at 11:30 A.M., it was unanimously agreed that Acting Chief of Police Witley Z. Mitchell be appointed Chief of Police. The Committee respectfully requests his appointment at the board meeting of February 19, 1940."

It is then alleged:

"That on February 19, 1940, the President with the approval of the Board of Trustees, accepted the Committee's recommendation and appointed relator Chief of the Police Department for the term expiring April 30th, 1941; that petitioner offers to produce at the hearing of this cause a certified copy of the proceedings of this meeting; that thereafter at a regular meeting of the Board of Trustees of the Village of Villa Park held on May 20, 1940, Lawrence S. Murphy, President, announced that all village appointments for the coming year, except the Building and Plumbing Inspector would remain the same; that the minutes of this meeting so far as they are pertinent to this suit, read as follows:

'At this time President Murphy stated that the appointments as before remain the same, except the Building and Plumbing Inspector. Trustee Butts moved that the appointments be approved, seconded by Trustee Olson and unanimously carried.'

Further allegations are: "That by the general ordinance of the Village governing the Police Department and this appointment, relator, who was holding the office of Chief of Police, was reappointed to that

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Trustee Officer and Chairman of the Board of Trustees moved this motion.

Further allegations are: "The following persons are alleged to have been involved in the activities of the Village Government, the Police Department and the Village Council, who were holding the office of Chief of Police, a member of the Village Council, a member of the Police Department and a member of the Village Council."

office, for the period of one year, commencing May 20, 1940, and ending May 19, 1941; that relator has occupied the office of Chief of Police constantly from August 15, 1939, up to and including May 12th, 1941;" that on May 13, 1941, he was told by the president and members of the police committee that he had been discharged from the office of Chief as of May 12, 1941, whereupon he wrote a letter to the commissioner of police, the president and one of the trustees advising them he stood ready to perform the duties and office of chief of police, acting chief of police, police officer and member of the police department in whatever capacity he was directed to serve, and was a de jure officer employed by the village prior to the adoption of civil service for police officers by vote of the people of the village; and received a reply from the president informing him he had not been a member of the police department for many months last past; that the official records of the board of trustees show that on May 12, 1941, a resolution was adopted declaring that the office of chief of police is and had been for many months last past vacant; that on the day last named, ordinance No. 456, abolishing the office of chief of police, and ordinance No. 457, creating the office of village marshal, were adopted as a part of a pre-conceived plan to discharge relator without a hearing by the board of fire and police commissioners, and to evade the provisions of the Fire and Police Commissioners act and exclude him from its benefit and protection; that upon the adoption of the act the right to appoint and discharge members of the police department, including the office or position of chief of police or village marshal became vested exclusively in the board of fire and police commissioners; that relator, having been a member of the police department for more than one year prior to April 12, 1941, holding the office of Chief, was entitled as a matter of right to continue in that office or position, or at least as a member of the department, and enjoy the salary attached thereto until discharged

of the department, and enjoy the salary attached thereto until discharged or right to continue in that office on position, or at least as a member April 12, 1941, holding the office of Chief, was entitled as a matter been a member of the police department for more than one year prior to ly in the board of fire and police commissioners; that relator, having position of chief of police or village marshal became vested exclusive- discharge members of the police department, including the office or tion; that upon the adoption of the act the right to appoint and and Police Commissioners not and exclude him from its benefits and pro- fire and police commissioners, and to evade the provisions of the fire conceived plan to discharge relator without benefit by the board of ing the office of village marshal, were adopted as a part of a pre- abolishing the office of chief of police, and ordinance No. 437, creat- months last past; that on the day last named, ordinance No. 438, declaring that the office of chief of police is and shall be for many board of trustees show that on May 12, 1941, a resolution was adopted department for many months last past; that the official records of the the president informing him he had not been a member of the police de- officers by vote of the people of the village; and received a reply from ployed by the village prior to the adoption of said statute for police ever especially he was directed to serve, and was a member of that ex- of police, police of law and order of the police department in what- ready to perform the duties and office of chief of police, acting as chief police, the president and one of the trustees advising that he stood as of May 12, 1941, whereupon he wrote a letter to the commissioners of police committee that he had been discharged from the office of Chief that on May 12, 1941, he was elected by the president and members of the constantly from August 12, 1939, up to and including May 12, 1941; May 12, 1941; that relator has occupied the office of Chief of Police office, for the period of one year, commencing May 12, 1940, and ending

or removed by the fire and police commissioners for just cause after a hearing upon written charges preferred against him; and that the action of the president and board of trustees in attempting to retain in its power the right to appoint and discharge the chief of police or village marshal was void, as in contravention of the terms of the act. The petition then alleges the provisions of the annual appropriation ordinance for the fiscal year "ending April 30, 1942" as containing items of: "C. 1 Salary Chief of Police (Under name of Village Marshal, \$2100.00.) -2. Salary Police Officers, \$9000.00", and that he is entitled to reinstatement to the office of chief of police and a salary of \$2100.00 fixed by the appropriation ordinance, or, in the alternative, to the position of patrolman or member of the police department and to the salary of \$1500.00 fixed by such ordinance.

An amendment to the petition alleges that on August 15, 1939, the date relator was appointed acting chief of police, he took the oath of office prescribed by the village ordinance, and at the same time offered to post the \$1000.00 bond required by the ordinances of the village, but was told by the police committee and the board of trustees they were not requiring the members of the police department to post a bond because of the expense it would incur; that he was further told the village was having a difficult time meeting its already existing and outstanding debts and could not pay for bonds of members of the department; that on February 19, 1940, and again on May 20, 1940, he again took the oath of office, and on or about the last mentioned date advised the board of trustees he would secure a surety bond at his own expense if the village would require subordinate members of the police department to execute a similar bond, but was again told by the police committee and the board of trustees they were excusing the members of the department from posting bond and he should make no further effort to secure it.

or removed by the fire and police commissioners; for that reason when a hearing upon written charges preferred against him, and that the action of the president and board of trustees in passing him or retaining in its power the right to appoint and discharge the chief of police or village marshal was void, as in contravention of the laws of the act. The petition then alleges the provisions of the municipal corporation ordinance for the fiscal year ending April 30, 1940, as containing items of: "C. I. Salary Chief of Police (Under name of Village Marshal, \$2100.00.) - \$2. Salary Police Officer, \$900.00", and that he is entitled to reinstatement to the office of chief of police and a salary of \$2100.00 fixed by the appropriation ordinance, or, in the alternative, to the position of patrolman or member of the police department and to the salary of \$1500.00 fixed by such ordinance. An amendment to the petition alleges that on August 15, 1940, the date relator was appointed acting chief of police, he took the oath of office prescribed by the village ordinance, and at the same time offered to post the \$1500.00 bond required by the ordinance of the village, but was told by the police committee and the board of trustees they were not requiring the members of the police department to post a bond because of the expense it would incur; that he was further told the village was having a difficult time meeting its already existing and outstanding debts and could not pay for bonds in advance of the department; that on February 19, 1940, and again on May 20, 1940, he again took the oath of office, and on or about the last mentioned date advised the board of trustees he would secure a surety bond at his own expense if the village would require subordinate members of the police department to execute a similar bond, but was again told by the police committee and the board of trustees they were excusing the members of the department from posting bond and he should make no further effort to secure it.



We will first consider the claim for alternative relief. The petition does not allege relator was ever appointed as a patrolman or to any position or office or as a member of the police department other than as acting chief of police, and as chief of police. In this court he states that he seeks restoration either to the office or position of chief of police, or in the alternative to any position in the police department; and claims that it is only necessary to show the position is one properly under the Fire and Police Commissioners act and that appropriations have been made therefor. He relies upon the following cases; People ex rel. Baird v. Stevenson, 270 Ill. 569; People ex rel. Sellers, v. Brady, 262 id. 579; People ex rel. Jacobs v. Coffin, 262 id. 589; and People ex rel. Kelly v. Dunham, 513 Ill. App. 13. Each of those cases involved the right to be restored to a particular position formerly held by the petitioner, and none of them has any bearing on the question of an alleged alternative right. In claiming that he is entitled in the alternative to be restored to "any" position in the police department, relator loses sight of the fact that one cannot be restored to a position he never held. Under the allegations of the petition it is obvious that if relator is entitled to any relief, it is not to alternative relief as a patrolman or to any other position apart from the office of chief of police. Furthermore, as to any right to be restored as a "member" of the police department, it is to be noticed that section 11 of the Fire and Police Commissioners act prescribes two classes to which it applies, i. e., "officers" and "members". Otherwise there would be no occasion to employ both of those terms. That there is a difference between an office, a position and an employment is pointed out in People ex rel. Jacobs v. Coffin, supra. The intent in section 11 to distinguish between the two classes therein mentioned is clear. The term "Officer" obviously refers to an officer in the commonly accepted meaning of that word. It is equally apparent that the term "member" refers to those who are not designated as officers. There is



nothing in the act from which it can be implied that the distinction can be ignored or relaxed so as to include an officer, either de jure or de facto, in the term "member" as separate or distinguished from his office. The allegation that relator was "a member of the police department" is a conclusion of the pleader, concerning which no fact is alleged. By ordinance No. 247 the position of chief of police was an office, and it is the only position to which it is claimed relator was ever appointed, except his alleged previous appointment as acting chief of police for six months. Therefore the petition must stand or fall upon the allegations as to his appointment as an officer to the office of chief of police and his incumbency thereof.

That issue must be decided upon the sufficiency of the facts well pleaded, which are admitted by the motion to dismiss, and not upon the conclusions of the pleader. (Barzowski v. Highland Park State Bank, 371 Ill. 412.) It is fundamental that mandamus is an extraordinary remedy, and that it is necessary that the petition show a clear right to the writ. Where one claims the right to an office it must affirmatively appear that the office legally exists and that the petitioner is lawfully entitled thereto. It is not enough that he was acting in an official character, but the petition must show that he was an officer de jure and not de facto. (People ex rel. Dunderdale v. City of Chicago, 327 Ill. 62; Moon v. <sup>The</sup> Mayor, 214 id. 40; Stott v. City of Chicago, 205 id. 281; Kenneally v. City of Chicago, 220 id. 485; McNeill v. City of Chicago, 212 id. 481; Purley v. Barber, 286 Ill. App. 486.)

Section 7 of ordinance No. 247 of the village provides:

"All members and officers of the police department shall be appointed by action of the president and board of trustees of the Village of Villa Park, to be shown of record."

The statute governing appointments of village officials during the period in controversy (Ill. Rev. Stat. 1939, chap. 24, par. 152, provided:

"The president and board of trustees may appoint a clerk pro tempore, and whenever necessary to fill vacancies; and may also appoint a treasurer, one or more street commissioners, a village marshal, and such other officers as may be necessary to carry into effect the powers conferred



on villages, to prescribe their duties and fees, and require such officers to execute bonds as may be prescribed by ordinance."

It has frequently been held that this section requires joint action by the president and trustees, each casting one vote, and that an appointment made by the president and approved by the trustees does not meet the requirements of the statute. (Six v. Village of Bluffs, 293 Ill. App. 640; People ex rel. Janosky v. Novotny, 273 id. 254; Lightfoot v. Village of Evergreen Park, 307 id. 411; People ex rel. McGinnis v. Paynter, 197 id. 78; McKean v. Gauthier, 132 id. 376; People ex. rel. Clute v. Hitchcock, 148 id. 446.) In McKean v. Gauthier, supra, cited also by appellant, four of six trustees voted that the plaintiff be appointed night watchman. The president did not vote when the roll was called, having previously requested to be excused from voting on appointments. Plaintiff filed his bond which was approved on a similar roll call, and his oath of office. The holding that mere irregularities in the manner of putting the question could not avail the president in a mandamus proceeding to compel him to sign warrants for the plaintiff's salary does not lessen the effect of the holding in the same case that the power of appointment resides in the president and trustees jointly.

The facts alleged by the petition as to relator's appointment are that he was appointed acting chief of police by the police committee of the board of trustees; "that on February 19, 1940, the President with the approval of the Board of Trustees, accepted the committee's recommendation and appointed relator Chief of the Police Department for the term expiring April 30th, 1941;" and that at a meeting held on May 20, 1940, the president "stated that the appointments as before remain the same, except the Building and Plumbing Inspector," with a motion carried that the appointments be approved. There is no allegation that any statute or ordinance authorizes appointments of officials by any committee, and any such ordinance would manifestly be invalid as not in compliance with the statute. Neither is there any allegation that relator was appointed

on villages, to preserve their status and to be able to elect officers to exercise their rights by a referendum.

It has frequently been held that a referendum is a

action by the people and that, accordingly, the referendum

that an amendment made by a referendum and approved by the people

does not need the approval of the legislature. (State v. Williams

1884, 23 Ill. 401; 1885, 23 Ill. 401; 1886, 23 Ill. 401; 1887, 23

Ill. 384; 1888, 23 Ill. 384; 1889, 23 Ill. 384; 1890, 23 Ill. 384; 1891, 23

Ill. 384; 1892, 23 Ill. 384; 1893, 23 Ill. 384; 1894, 23 Ill. 384; 1895, 23

Ill. 384; 1896, 23 Ill. 384; 1897, 23 Ill. 384; 1898, 23 Ill. 384; 1899, 23

Ill. 384; 1900, 23 Ill. 384; 1901, 23 Ill. 384; 1902, 23 Ill. 384; 1903, 23

Ill. 384; 1904, 23 Ill. 384; 1905, 23 Ill. 384; 1906, 23 Ill. 384; 1907, 23

Ill. 384; 1908, 23 Ill. 384; 1909, 23 Ill. 384; 1910, 23 Ill. 384; 1911, 23

Ill. 384; 1912, 23 Ill. 384; 1913, 23 Ill. 384; 1914, 23 Ill. 384; 1915, 23

Ill. 384; 1916, 23 Ill. 384; 1917, 23 Ill. 384; 1918, 23 Ill. 384; 1919, 23

Ill. 384; 1920, 23 Ill. 384; 1921, 23 Ill. 384; 1922, 23 Ill. 384; 1923, 23

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Ill. 384; 1944, 23 Ill. 384; 1945, 23 Ill. 384; 1946, 23 Ill. 384; 1947, 23

Ill. 384; 1948, 23 Ill. 384; 1949, 23 Ill. 384; 1950, 23 Ill. 384; 1951, 23

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Ill. 384; 1988, 23 Ill. 384; 1989, 23 Ill. 384; 1990, 23 Ill. 384; 1991, 23

Ill. 384; 1992, 23 Ill. 384; 1993, 23 Ill. 384; 1994, 23 Ill. 384; 1995, 23

Ill. 384; 1996, 23 Ill. 384; 1997, 23 Ill. 384; 1998, 23 Ill. 384; 1999, 23

Ill. 384; 2000, 23 Ill. 384; 2001, 23 Ill. 384; 2002, 23 Ill. 384; 2003, 23

Ill. 384; 2004, 23 Ill. 384; 2005, 23 Ill. 384; 2006, 23 Ill. 384; 2007, 23

by the president and the trustees, as prescribed by the statute. Under the above holdings the approval by the trustees of the appointment made by the president does not meet the statutory requirements.

There is another reason why relator was not a de jure officer.

Section 4 of article 6 of the Cities and Villages Act as then in force (Ill. Rev. Stat. 1939, chap. 24, par. 87,) provided:

"All officers of any city or village, whether elected or appointed, shall, before entering upon the duties of their respective offices, take and subscribe the following oath or affirmation: \* \* \* Which oath or affirmation, so subscribed, shall be filed in the office of the clerk. And all such officers, except aldermen and trustees, shall, before entering upon the duties of their respective offices, execute a bond with security to be approved by the city council or board of trustees, payable to the city or village, in such penal sum as may, by ordinance or resolution, be directed, conditioned for the faithful performance of the duties of the office and the payment of all moneys received by such officer, according to law and the ordinances of said city or village. \* \* \* Such bonds shall be filed with the clerk." \* \* \*"

Section 3 of ordinance No. 247 sets the bond of the chief of police at \$1000.00. The petition does not allege that relator ever filed his oath with the clerk, and affirmatively shows that he never executed a bond, as required by both the statute and the ordinance. Of course if he never executed a bond he did not file it with the clerk. The statute requires that both the oath and the bond shall be so filed. Nobody has any authority, either as individuals, or as president and board of trustees acting as such, whether at a regular meeting or otherwise, to waive the provisions of the statute, and it is not even alleged that the village officials attempted to waive such provisions at any meeting of the board. Relator's alleged offer to furnish bond if subordinate members were required to do so was merely conditional and did not amount to an offer to comply with the law. The claim that the village should be estopped from contending relator had not been employed as a regular member of the police department is without merit. Treating him as such did not create an estoppel. (Bullis v. City of Chicago, 235 Ill. 472;





People ex rel. R~~ally~~ v. City of Kankakee, 283 Ill. App. 162.) The case of Frederick v. City of Peoria, 293 Ill. App. 496, relied upon by appellant, was not a mandamus proceeding, but was a suit for salary as a holdover officer, after having been properly appointed and having qualified by filing his oath and bond. One who has once been regularly appointed and has qualified by filing his oath and bond, does not, by failing to file a new oath and bond upon his reappointment, cease to be a de jure officer. (City of Pekin v. Industrial Commission, 341 Ill. 312.) The Frederick case has no application here.

The most that the petition shows is that relator was a de facto officer until he was discharged. Being only such, he was holding and exercising the functions of his office at the mere will of the village and could be deprived of it at any moment the village might elect. Having never been appointed in the manner prescribed by law, and having never qualified, he was not a de jure officer, and is not entitled to the writ. (McNeill v. City of Chicago, supra.)

We do not agree with the relator's contention that ordinances Nos. 456 and 457 are void. He alleges they were adopted for the purpose of discharging him without a hearing by the board of fire and police commissioners, and to evade the provisions of the Fire and Police Commissioners act and deprive him of its benefit and protection. In People ex rel. Jacobs v. Coffin, supra, a civil service employee, regularly appointed in compliance with the provisions of the Civil Service Act, was suspended for thirty days, restored to the rolls, and again laid off. The records of the civil service commission showed that on the same day the position was abolished. Nevertheless, another party was appointed to perform the duties of the position. Under the act the petitioner could not be suspended for more than thirty days or discharged except for cause on written charges and a hearing. In holding

People ex. v. Jacobus v. C. (1871), 100 N.Y. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

the petitioner was entitled to be restored, the court said that neither the city nor the civil service commission could legally abolish a position temporarily for the unlawful purpose of later re-establishing it and installing therein another person. In *City of Chicago v. Luthardt*, 191 Ill. 516, another civil service employee appointed in compliance with the act, sued for back salary for the period during which he was under an illegal change, without charges preferred or a hearing. The common council had attempted to abolish the position by changing the title and making an appropriation for the position under the new name, but none under the old title. The court held the petitioner was entitled to recover. These cases are relied upon by relator. The distinguishing difference between them and the case at bar is that in each of those cases the petitioner's appointment was made in conformity with the requirements of the Civil Service Act, and he was entitled to hold his position until he was discharged for cause after a hearing upon written charges. That situation is not present in this case, and those decisions are not applicable here. In this case, the relator, being only a de facto officer, subject to discharge at any moment at the mere will of the village authorities, (*McNeill v. City of Chicago*, supra), had no tenure in the office and no rights or interest therein that could be affected by his discharge or by the enactment of either or both of the two ordinances. It is a familiar rule of law that one can not complain of something which does not affect him. It is manifest that the adoption of the Fire and Police Commissioners act by the Village could not change relator's status as only a de facto officer, or convert it from such an office to that of a "member" of the police department, under the meaning of that term as used in the act, but his status remained the same. If the ordinances were enacted with the purposes claimed, they are not invalid for that reason, because relator had no right to retain the office and no right

the petition was not filed in the court, the court will not  
neither the city nor the civil service commission. The  
a position was held for the purpose of the civil service  
it and that the civil service commission is not a part of the  
1911 Act, and the civil service commission is not a part of the  
the act, and for the purpose of the civil service commission  
illegally on the part of the civil service commission. The  
oil had been used to collect the petition, and the civil  
ing an agreement for the civil service commission, but none  
the old title. The court will not allow the petition to  
These cases are decided by the civil service commission.  
between them and the civil service commission is the civil  
petitioner's agreement with the civil service commission  
of the Civil Service Act, and the civil service commission  
until he was discharged for a new title, and the civil  
That situation is not covered by the civil service commission.  
applicable here. The civil service commission is not a part  
er, subject to the civil service commission, and the civil  
authorities, (Civil Service Act, 1911), and the civil  
office and no rights or interests are affected by his  
discharge or by the appointment of a new title.  
It is a familiar rule of law that one who has a right which  
does not affect it. It is a right that should be maintained  
Police Commission for the civil service commission, and the  
as only a "fact" officer, or a member of the civil service  
of a "member" of the police department, under the terms of the  
as used in the act, but his status remains the same. If the  
were enacted with the purpose of the civil service commission,  
reason, because the civil service commission had no right to

to a hearing before he could be discharged. There being nobody whose rights could be affected by abolishing the office of chief of police, the village had a right to abolish it. The statute provides for the office of village marshal, and it follows that the village had a right to create it. The allegation that the latter ordinance "did not actually abolish the office of Chief of Police but merely changed the title of the office to Village Marshal, and vested the same identical powers and duties formerly in the Chief of Police in the Village Marshal" is refuted by the terms of the ordinances themselves, which the petition purports to set in haec verba. Disregarding the fact that ordinance No. 456 expressly abolishes the office of chief of police and that ordinance No. 457 creates the office of village marshal, they show on their face that the powers and duties of the two officers are not the same, but differ in several material particulars. An allegation inconsistent with other facts alleged in the petition is of no force.

The petition does not show that petitioner is entitled to any of the relief prayed. The judgment of the circuit court is therefore affirmed.

Judgment affirmed.



41907

JOHN T. CLEGG,

Plaintiff,

v.

GEORGE H. GOULD and G. M. FULLER,

Defendants.

On Appeal of GEORGE H. GOULD,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

3141A. 670

MR. PRESIDING JUSTICE HUMPHREY DELIVERED THE OPINION OF THE COURT.

In a complaint filed in the Circuit Court of Cook County on April 26, 1940, John T. Clegg alleged that on April 12, 1938 he loaned \$2,500, on July 1, 1938, \$35, and on July 2, 1938, \$185, a total of \$2,700, to George H. Gould and G. M. Fuller, defendants, which they promised to repay on April 12, 1940; and that they refused to pay. He asked judgment for \$2,700. George H. Gould was served with a writ of summons. G. M. Fuller was not served and did not appear. On July 6, 1940, George H. Gould filed an answer admitting that the defendants received the \$2,700, but denying that he was indebted to the plaintiff. With the answer, Gould filed a counterclaim, alleging that on April 12, 1938 plaintiff and defendants entered into a written contract. By the contract plaintiff agreed to loan to the defendants \$5,000, of which \$2,500 was loaned on the day it was executed. Plaintiff agreed to deliver the balance of \$2,500 within 120 days. Defendants agreed to pay plaintiff interest at 6 percent per annum and to repay the \$5,000 on April 12, 1940, plus "a bonus of \$1,000." Defendants agreed that upon demand at any time within the period of two years, they would "see" that plaintiff would "be offered a general agency contract in such territory as may be available, to handle Accident and Health and Life Insurance of the Great Northern Life Insurance Company of Milwaukee, Wisconsin". Defendants further agreed that in the territory turned over to plaintiff, any business which defendants "may have on their books in this territory at this time will be transferred, without cost," to plaintiff

JOHN T. CLARK

Attorney

GEORGE E. FULMER and G. E. FULMER

Defendants

On appeal of GEORGE E. FULMER

Appellant

3141A.070

THE FOLLOWING JURISDICTION WAS FILED IN THE COURT OF THE DISTRICT OF COLUMBIA

In a complaint filed in the District Court of Cook County on April 22, 1940, John T. Clark alleged that on April 12, 1938 he loaned \$2,500, on July 1, 1938, \$25, and on July 2, 1938, \$25, a total of \$2,550, to George E. Fulmer and G. E. Fulmer, defendants,

which they promised to repay on April 12, 1940; and that they

refused to pay. He asked judgment for \$2,550, George E. Fulmer

was served with a writ of summons. G. E. Fulmer was not served and

did not appear. On July 6, 1940, George E. Fulmer filed an answer

admitting that the defendants received the \$2,550, but denying that

he was indebted to the plaintiff. In the answer, Fulmer filed a

counterclaim, alleging that on April 12, 1938 plaintiff and defendants

entered into a written contract. By the contract plaintiff agreed

to loan to the defendants \$2,500, of which \$2,500 was loaned on the

day it was executed. Plaintiff agreed to deliver the balance of

\$2,500 within 120 days. Defendants agreed to pay plaintiff interest

at 6 percent per annum and to repay the \$2,500 on April 12, 1940,

plus "a bonus of \$1,000." Defendants agreed that upon payment of any

time within the period of two years, they would "see" that plaintiff

would "be offered a General Agency contract in such territory as may

be available, to handle Accident and Health and Life Insurance of the

Great Northern Life Insurance Company of Milwaukee, Wisconsin."

Defendants further agreed that in the territory turned over to plain-

tiff, any business which defendants "may have on their books in this

territory at this time will be transferred, without cost," to plaintiff



and that plaintiff from that day on "will receive renewal commissions on this business". Defendant (counterclaimant) averred that plaintiff delivered \$2,700 under the contract, but although often requested so to do, failed to deliver to the defendants the balance of \$2,300 as contemplated by the contract; that at the time the contract was made, plaintiff knew that defendants had a contract with the Great Northern Life Insurance Company of Milwaukee whereby defendants were to create and build up insurance agencies to handle accident, health and life insurance business; and that plaintiff knew that in order to accomplish the object of their contract with the insurance company defendants would have to advance and expend large sums of money, and that the \$5,000 which was to be procured from plaintiff was to be used by them for that purpose; that he and Fuller, in reliance upon the promise of plaintiff to loan \$5,000, incurred obligations in the sum of \$10,000, and that by reason of the failure of plaintiff to "advance" the balance of the loan in the sum of \$2,300, defendants were unable to carry out their obligations. Counterclaimant further asserted that he and Fuller suffered damages in the sum of \$10,000, for which they asked judgment. Plaintiff, answering counterclaimant, admitted the execution of the contract, denied that counterclaimant requested him to pay the balance of \$2,300, and alleged that prior to the expiration of the 120 days mentioned in the contract, defendant Gould stated to him (plaintiff) that he should not pay over the balance of \$2,300; that Gould refused to accept the balance at that time; that Gould advised him (plaintiff) that difficulties had arisen between him (Gould) and Fuller. This answer also denied that plaintiff had any knowledge of any contract between the life insurance company and defendants, or that he knew that the \$5,000 mentioned in the contract was to be used for building up insurance agencies; and further denied that Gould and Fuller, relying upon the loan of \$5,000, entered into certain contracts and incurred certain obligations, and denied that Gould and Fuller failed to carry out their obligations because of their reliance on their contract with him. On December 31, 1940, the

and that plaintiff from that day on "will receive renewal commissions on this business". Defendant (counterclaimant) averred that plaintiff delivered \$2,700 under the contract, but although other payments as to be, failed to deliver to the defendant the balance of \$2,500 as contemplated by the contract; that at the time the contract was made, plaintiff knew that defendant had a contract with the Great Northern Life Insurance Company of Milwaukee whereby defendant was to create and build up insurance agencies to handle accident, health and life insurance business; and that plaintiff knew that in order to accomplish the object of their contract with the insurance company defendant would have to advance and expend large sums of money, and that the \$2,700 which was to be procured from plaintiff was to be used by them for that purpose; that he and Fuller, in reliance upon the promise of plaintiff to loan \$2,000, incurred obligations in the sum of \$10,000, and that by reason of the failure of plaintiff to "advance" the balance of the loan in the sum of \$2,500, defendants were unable to carry out their obligations. Counterclaimant further asserted that he and Fuller suffered damages in the sum of \$10,000, for which they seek judgment. Plaintiff, answering counterclaim, admitted the execution of the contract, denied that counterclaimant requested him to pay the balance of \$2,500, and alleged that prior to the expiration of the 180 days mentioned in the contract, defendant would state to him (plaintiff) that he should not pay over the balance of \$2,500; that Gould refused to accept the balance at that time; that Gould advised him (plaintiff) that defendant had arisen between him (Gould) and Fuller. This answer also denied that plaintiff had any knowledge of any contract between the life insurance company and defendant, or that he knew that the \$2,000 mentioned in the contract was to be used for building up insurance agencies; and further denied that Gould and Fuller, relying upon the loan of \$2,000, entered into certain contracts and incurred certain obligations, and denied that Gould and Fuller failed to carry out their obligations because of their reliance on their contract with him. On December 21, 1940, the

court called the case for trial and had an order spread of record that "there has been no service of summons had upon the defendant G. M. Fuller". Thereupon, the court proceeded to hear evidence. The record shows that the trial was then discontinued. This was because the attorney for the plaintiff became ill. On February 24, 1941 the case was tried before another judge, who found the issues for plaintiff and against the defendants George H. Gould and G. M. Fuller, and assessed plaintiff's damages at the sum of \$2,700. He also found the issues for the plaintiff and against the counterclaimant, George H. Gould, as to his counterclaim, and entered judgment for the plaintiff and against George H. Gould and G. M. Fuller for \$2,700 and costs. George H. Gould appealed.

The first criticism leveled at the judgment is that plaintiff's complaint does not support the judgment. He relies upon the provisions of Sec. 38 of the Civil Practice Act (Sec. 180, Ch. 110, Ill. Rev. Stat. 1941) and argues that as plaintiff did not attach a copy of the contract to his complaint, the court should have refused to enter judgment. Defendant also contends that this section of the Practice Act is mandatory and requires the written instrument upon which the action is founded to be attached to the complaint, or that the complaint recite the instrument or the material portions of it. Plaintiff meets this argument by reciting Par. 3 of Sec. 42 of the Civil Practice Act (Par. 3, Sec. 186, Ch. 110, Ill. Rev. Stat. 1941) that "all defects in pleadings, either in form or substance, not objected to in the trial court, shall be deemed to be waived." We have searched the record and cannot find that defendant objected to the complaint in the trial court. Apparently, he was satisfied that it stated a cause of action against him and he relied on his counterclaim. We have frequently held that propositions not raised in the trial court cannot be urged on appeal.

The second point presented by defendant is that the trial court erred in entering judgment for \$2,700 as against both defendants, when only one was served. A perusal of the record convinces us that

George F. Gould applied.

[illegible]

The second solid presented by defendant is that the FBI  
could have in entering judgment for a \$100,000 bond against him,  
when only one was offered. A review of the record in this

the entry of the judgment against Fuller was because of a mistake. The court had previously found that Fuller was not served. The judgment against Fuller is, of course, a nullity. We do not see how the fact that a judgment was erroneously entered against Fuller prejudiced Gould. Plaintiff's claim against the defendants was joint and several. Furthermore, Sec. 27 of the Civil Practice Act (Sec. 151, Ch. 110, Ill. Rev. Stat. 1941) provides that "when several joint debtors are sued, and any one or more of them shall not be served with process, the pendency of such suit or the recovery of a judgment against the parties served shall not be a bar to a recovery on the original cause of action against such as are not served, in any action which may be thereafter brought. This section shall not be so construed as to allow more than one satisfaction". Moreover, defendant did not urge this point in the trial court and will not be permitted to do so here. The third point advanced by defendant is that the court erred in entering the joint judgment against him. He contends that the complaint states a cause of action on a joint liability of two defendants and that judgment must be rendered against both or none. Our discussion of the previous point answers this point.

Defendant maintains that the judgment is against the manifest weight of the evidence. A careful reading of the transcript convinces us that this point is without merit. The court saw and heard the witnesses and in our opinion was fully justified in entering the finding and judgment.

Finally, defendant insists that the judgment is not supported by the record. In arguing this proposition defendant refers to the points heretofore discussed. Our view is that the record supports the judgment. For these reasons the judgment of the Circuit Court of Cook County is affirmed as to George H. Gould. The Circuit Court has ample power to expunge that part of its record showing the judgment entered by mistake against G. M. Fuller.

JUDGMENT AFFIRMED.

HEBEL AND KILEY, JJ. CONCUR.

the entry of the judgment in the trial court and because of a mistake, the court had previously found that the entry was not correct. The judgment against Miller is, of course, a nullity. It does not set aside the fact that a judgment was erroneously entered against Miller. The judgment against Miller's claim against the defendants was found not to be correct. Sec. 22 of the Civil Practice Law and Rules, Ch. 13, Art. 1, provides that when several joint debtors are sued, and any one or more of them shall not be served with process, the entry of such suit or the recovery of a judgment shall not be a bar to a recovery in the original suit of a claim against such as are not served, in any action which may be thereafter brought. This section shall not be so construed as to allow more than one satisfaction. Moreover, defendant did not urge this point in the trial court and will not be permitted to do so now. The third point advanced by defendant is that the court erred in granting the joint judgment against him. He contends that the judgment is a nullity of action on a joint liability of two defendants and that judgment must be rendered against both or none. Our discussion of the previous point answers this point.

Defendant maintains that the judgment is against the manifest weight of the evidence. A careful reading of the transcript confirms us that this point is without merit. The court can and should take the witness and its own opinion was fully justified in entering the finding and judgment.

Finally, defendant insists that the judgment is not supported by the record. In arguing this proposition defendant refers to the points heretofore discussed. Our view is that the record on this point judgment. For these reasons the judgment of the trial court of Cook County is affirmed as to George E. Gould. The trial court has no power to expunge that part of its record showing the judgment entered by mistake against G. E. Miller.

ORDER AND JUDGMENT.

42106

FAY WEINER,

Appellant,

v.

RICHARD M. KJELSTAD,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

Modified  
Opinion

314 I.A. 671

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Fay Weiner filed a complaint in the Superior Court of Cook County against Richard M. Kjelstad to recover damages for personal injuries growing out of an accident on April 17, 1940, at the intersection of Milwaukee and Spaulding Avenues in Chicago. The jury returned a verdict finding the defendant guilty and assessing plaintiff's damages at the sum of \$300. Plaintiff moved for a new trial and defendant moved for a judgment non obstante verdicto. Both motions were denied and judgment was entered on the verdict. Plaintiff asks that the judgment be reversed and that she be allowed a new trial.

Plaintiff's theory of the case is that she was crossing the intersection of Milwaukee and Spaulding Avenues, at the west crosswalk, in a southerly direction; that she was at all times in the exercise of due care and caution for her own safety; that the defendant, who was operating his automobile in a southeasterly direction on Milwaukee Avenue, caused his motor vehicle to run into, upon and against plaintiff; that the defendant did not blow his horn or give any signal of the approach of his automobile; that the defendant failed to keep his motor vehicle under proper and sufficient control; that the defendant was watching the plaintiff continually from the time he first saw her walking across until his automobile struck her; that he otherwise operated his automobile in a careless, negligent and reckless manner and so as to exhibit wilfulness and wantonness; that plaintiff was seriously and permanently injured and expended considerable sums

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of money in hospital and medical bills, together with substantial loss in earnings and income; that the verdict and judgment is shockingly inadequate and unjust and plainly not based upon the evidence or the law; that there is no basis in law, common sense or justice to support the amount of the verdict and judgment thereon as to the damages, and that plaintiff should have been granted a new trial; and that other errors were committed which justified the granting of a new trial. Defendant's theory of the case is that plaintiff was crossing Milwaukee Avenue going south on the west crosswalk of Spaulding Avenue; that she had a clear view to the west for about a block; that she never saw the automobile of defendant which was in full and plain view and was seen by other persons; that defendant was traveling at a reasonable speed; that he gave her warning by his horn two or three times; that he did everything he could to avoid the accident; that the plaintiff did nothing whatever to attempt to avoid the accident, and that she walked into the left front door of defendant's car; that the accident was caused solely by plaintiff's own negligence or wilful and wanton conduct; that defendant was at all times in the exercise of due care and plaintiff was not entitled to any damages; that plaintiff had no serious injuries; that the evidence as to her damages and injuries was so conflicting and so exaggerated as to lead the jury to have serious and justifiable doubts as to the truth of any of it; and that plaintiff had a fair trial, and that she had no reason to complain of receiving \$300 more than she was entitled to.

Milwaukee Avenue, a street car thoroughfare, extends northwest and southeast and is about 40 feet wide at Spaulding Avenue. Spaulding Avenue extends straight north and south and is not as wide as Milwaukee Avenue. The latter has street car tracks for both northwest and southeast bound street cars. Plaintiff, a woman 33 years of age, was walking across Milwaukee Avenue at the west crosswalk

of money in hospital and medical bills, together with other bills, loss in earnings and interest; that the various bills and interest are approximately inadequate and unjust and plaintiff has a right to recover the same; that there is no basis in fact or law for the defense to set aside the amount of the verdict and judgment awarded to the plaintiff, and that plaintiff should have a new trial; and that other errors were committed which justified the granting of a new trial.

Defendant's theory of the case is that plaintiff is crossing Milwaukee Avenue going south on the west crosswalk at crossing Avenue; that she had a clear view to the west for about a block; that she never saw the automobile of defendant which was in full and plain view and was seen by other persons; that defendant was traveling at a reasonable speed; that he gave her warning by his horn two or three times; that he did everything he could to avoid the collision; that the plaintiff did nothing whatever to assist to avoid the collision, and that she slipped into the left front door of defendant's car; that the collision was caused solely by plaintiff's own negligence or willful and wanton conduct; that defendant was at all times in the exercise of due care and diligence; that defendant was not entitled to any damages; that plaintiff had no injuries; that the evidence as to her damages and injuries was so conflicting and so exaggerated as to lead the jury to have serious and justifiable doubts as to the truth of any of it; and that plaintiff had a fair trial, and that she had no reason to complain of receiving 1500 more than she was entitled to.

Milwaukee Avenue, a street now thoroughfare, extends north-west and southeast and is about 40 feet wide at crossing Avenue. Crossing Avenue extends straight north and south and is not as wide as Milwaukee Avenue. The latter has street car tracks for both northwest and southeast bound street cars. Plaintiff, a woman 30 years of age, was walking across Milwaukee Avenue at the west crosswalk

from the north to the south side of the street. At the time of the occurrence, the motor vehicle was being driven by the defendant in a southeasterly direction on Milwaukee Avenue. On arriving at the corner, plaintiff looked both east and west. She saw a street car about a block and a half to the northwest, which was proceeding in a southeasterly direction. Automobiles proceeding in the same direction were following the street car. She testified that she did not see the automobile of defendant at any time until the accident occurred, although her view to the west was not obstructed. Plaintiff was crossing where people usually cross. She worked at Huben's Women's Apparel Shop, 1314 Milwaukee Avenue, and was crossing the street for the purpose of boarding a street car which would convey her to her place of employment. She testified she heard no horn or signal before she was struck; that she "just took a few steps and just took my eyes up and there was a machine". The next thing she remembered she was in bed in a hospital. She further testified that after leaving the sidewalk she "took three or four steps on the street and there was the machine on top of me". Answering the question, "When you say on top of you, do you mean at the point of impact?", she answered, "Yes". In answer to the question, "Do you know what part of the car came in contact with you?", she answered, "I believe it was the front fender". She was then asked, "Right or left side?", and answered, "I was going this way [indicating] and he was going this way, that side [indicating]". She was then asked, "I assume by that you mean the left side?", and she answered, "About the left door". Defendant testified that he was traveling in a southeasterly direction on Milwaukee Avenue; that he had stopped alongside of a street car at the block west of Spaulding Avenue; that he started up at the same time as the street car and passed it, and was then straddling the inner rail of the eastbound street car track; that he was going about 20 or 25 miles an hour; that he saw plaintiff start to cross the street when he was about 50 feet from Spaulding Avenue; that he then



slowed down and blew his horn; that he blew his horn again and put his foot on the brakes and swerved to the right when he was about 15 feet from her; that he realized that she was going to continue on; that she walked into the left front door of the car. Walter Kuehr, called by plaintiff, testified that he was employed as a janitor for a building in the vicinity; that he was 25 or 30 feet from the southwest corner at the time of the occurrence, walking south on the west crosswalk of Spaulding Avenue; that he did not see defendant's automobile until plaintiff was hit; that he heard a scream; that she was lying on the northwest bound street car tracks; that the first time he saw plaintiff was when she was lying on the ground; that he did not hear any horn or see any signal given, and that the automobile stopped 25 or 30 feet from the scene of the accident. Joseph Towelski, another witness called by plaintiff, testified that he saw an automobile (defendant's) come from behind the street car; that the front bumper, left side of the automobile, hit the lady who was crossing the street there; that he did not hear any horn or signal. On cross-examination, this witness reiterated that "the front bumper, left side, came in contact with the girl". He further testified that the driver drove around the corner and stopped; that the view of the street was unobstructed and that he was able to see the automobile coming without trouble.

Plaintiff was taken to the Belmont Hospital, where she was treated by Dr. Saul Kaufman. When he first examined her, she was in bed in a semi-conscious state. Blood was running all over her nose, left eye and lip. Morphine and glucose solutions were injected into the veins. On the following day blood was still coming from the eye, nose and lip. The torn skin tissue above the eye was removed, the lip was sewed and the eye and lip were bandaged. Both eye tendons were brought together. There were 14 to 18 sutures put over the eye and 6 to 8 sutures in the lip. Plaintiff complains of dizziness,

almost down and blew his horn; that he blew his horn in the road and  
 foot on the brakes and answered to the right when he was about 10 feet  
 from her; that he realized that she was going to continue on; that  
 she walked into the left front door of the car. After which, called  
 by Plaintiff, testified that he was employed as a janitor for a building  
 in the vicinity; that he was on the 10 foot from the corner at the  
 at the time of the occurrence, walking north on the west sidewalk of  
 Spaulding Avenue; that he did not see defendant's automobile until  
 Plaintiff was hit; that he heard a scream; that she was lying on the  
 northwest bound street car tracks; that the first time he saw Plaintiff  
 was when she was lying on the ground; that he did not hear any horn or  
 see any signal given, and that the automobile stopped 20 or 30 feet  
 from the scene of the accident. Joseph Crawford, another witness  
 called by Plaintiff, testified that he saw an automobile (defendant's)  
 come from behind the street car; that she went under, left side of  
 the automobile, hit the lady who was crossing the street there; that  
 he did not hear any horn or signal. On cross-examination, this witness  
 testified that "the front bumper, left side, came in contact with  
 the girl". He further testified that the driver drove around the  
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 lip was sewed and the eye and lip were bandaged. Both eye flaps  
 were brought together. There were 14 to 18 sutures put over the eye  
 and 5 to 8 sutures in the lip. Plaintiff complains of blindness,

headaches and bad hearing in her left ear. Some of her teeth were loosened in the accident. She remained in the hospital and in bed for 11 or 12 days, where she received treatment to her head, back and left leg. At the hospital she was strapped for traumatic pleurisy, and the straps were kept on about 10 days. The doctor found that she had sustained a cerebral concussion with rupture of a cerebral blood vessel, traumatic pleurisy, sprain of the sacro-illiac joint, secondary anemia and marked contusion or laceration of the left leg. After she was removed to her home the physician treated her there for about 6 weeks, giving her infra-red treatments for the chest, back, lower spine and head. For pain and sleeplessness she was given sedatives, and liver extract and tablets for anemia and the loss of blood. After being treated at her home for six weeks, she went to the doctor's office every week until the first of the following year and received treatments for the pains in her head and the anemia. She made about 80 visits to the doctor's office and was still under his care at the time of the trial. In May, 1941, Dr. Kaufman sent her to Dr. Sigmund Krumholz, a psychiatrist. She paid Dr. Kaufman \$100 on account of his bill of \$340. She received dental care of her teeth which had been loosened in the accident, and a new bridge was made to replace the one that had been broken. She was also treated in April, 1940 by a Dr. Abelio, whom she saw 3 or 4 times. She testified that she weighed 123 pounds before the accident, and that at the time of the trial she weighed 107 pounds; that she cannot see as well as before the occurrence; that before the accident she wore glasses only when she read, and that subsequent to the accident she was fitted for other glasses. She testified that she had scars on her face about the left eye and lower lip and on her left leg. She suffers from headaches and dizziness about once every week and suffers from general weakness. Dr. Kaufman testified that in his opinion the condition from which she was suffering was permanent. Plaintiff

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maintains that the actual expense incurred by her amounted to \$1,091.30, made up of Dr. Kaufman's bill for \$340, the hospital bill of \$139, and the loss of \$612, which she would have earned during 17½ weeks at an average of \$35 a week.

Plaintiff urges that the amount of the verdict is grossly and wholly inadequate and manifestly against the weight of the evidence relative to the actual damages and losses and the physical injuries sustained by her, and that it is obvious that the jury disregarded competent and credible testimony, ignored the court's instructions, and failed to take into consideration proper elements of damages clearly proven. In reply to this contention defendant asserts that the verdict was not inadequate; that plaintiff was guilty of contributory negligence which was the proximate cause of the accident, and that as she is not entitled to recover at all, she cannot complain that the verdict in her favor is inadequate. Defendant maintains that there was a serious conflict in the evidence as to what plaintiff was suffering from, and as to whether she suffered any damage of consequence, and calls attention to the cross-examination of Dr. Kaufman, who testified that his diagnosis of secondary anemia was based on the excessive loss of blood from the areas that were bleeding. He did not recall using the hemoglobin or blood count when he made his diagnosis. Dr. Kaufman conceded that X-ray is one of the means of determining whether there is pneumonia or pleurisy. He did not claim to have any X-ray evidence to substantiate his claim of pleurisy, and Dr. Hansen, defendant's witness, testified that plaintiff's exhibits 2 and 4 were negative of any evidence of pathology and concurred in the statement of Dr. Kaufman that pleurisy could be seen in an X-ray film if it were in fact present. Dr. Kaufman further admitted that if there was a separation of the sacro-iliac joint, it would appear in the X-ray of the patient. He did not remember whether it appeared in the X-ray. As far as he knew, it did not. Dr. Hansen testified positively that it did not appear.

plaintiff's account of the events leading to the accident is  
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of 1901, and the fact that the plaintiff was  
12 weeks of an average of 12 weeks.  
Plaintiff states that the account of the accident is  
and wholly in accordance with the account of the  
evidence relative to the actual facts and losses and the physical  
injuries sustained by her, and that it is obvious that the jury  
discrepancies consistent with the facts, and that the court's  
instructions, and it is to be noted that the plaintiff's account  
of damages is clearly proven. In reply to this statement of  
evidence that the plaintiff is not entitled to the relief which  
guilt of contributory negligence which is the plaintiff's  
the accident, and that she is not entitled to recover at all, and  
cannot explain that the verdict is not in her favor. Plaintiff  
maintains that there was a serious accident in the evidence as to  
what plaintiff was suffering from, and as to the extent of  
damages of consequence, and calls attention to the statement  
of Dr. Hansen, who testified that his diagnosis of plaintiff's  
was based on the excessive loss of blood from the fact that there  
bleeding. He did not recall seeing the hemorrhage or blood coming  
when he made his diagnosis. Dr. Hansen admitted that X-ray is one  
of the means of determining whether there is hemorrhage or fracture.  
He did not claim to have any X-ray evidence to substantiate his claim  
of fracture, and Dr. Hansen, defendant's witness, testified that  
plaintiff's exhibits 2 and 3 were not of any value as evidence of fracture  
and occurred in the statement of Dr. Hansen that plaintiff could be  
seen in an X-ray film if it were in that position. Dr. Hansen  
further testified that if there was a separation of the sacro-splenic  
joint, it would appear in the X-ray of the pelvis. He did not  
remember whether it appeared in the X-ray. As far as the X-ray is  
not. Dr. Hansen testified positively that it did not appear.

Dr. S. I. Weiner, called by plaintiff, testified that if there is very slight hemorrhages or very slight fluid in the pleura, or if the pleura has not had a chance to become thickened over a sufficient length of time, the X-ray will not show it, and that a simple sprain of the sacro-iliac joint cannot be diagnosed in a X-ray picture. It was also claimed that plaintiff was suffering from tachycardia, which was defined by Dr. Kaufman as an acceleration of the heart, or a rapid heart. On Cross-examination, he testified that she suffered from shock, caused by loss of blood. He stated that one of the symptoms of shock is slow pulse. Defendant argues that this testimony is contradictory in that it shows the patient as having a slow pulse and a rapid heart beat at the same time. Defendant also points out that Dr. Kaufman testified that plaintiff's blood pressure was 90 over 60 diastolic, which he said was a normal ratio, and that when confronted by the record of the interne that the blood pressure was 128 over 82 on the same day that she came in, said that this was normal. Plaintiff testified that she worked at Huben's store for 3 years before the accident, selling dresses, coats and other articles of apparel and that she worked steadily in the year prior to the accident. It developed later, however, that for 8½ months she had been in California, with the exception of 2 or 3 weeks she had worked before the accident. She testified on direct examination that her average earnings were approximately \$40 a week. On cross-examination, she admitted that she made \$22 a week, and that at no time, even during the weeks around Christmas, the best in the year in that business, did she make \$40 a week. The contention of defendant as to her earnings is supported by the earning record of her employer. Defendant argues that the jury had the right to conclude, and rightfully concluded, that the injuries suffered were of a minor character and that she attempted to build up her injuries and damages far beyond their real stature.

Dr. H. L. Fisher, called a plaintiff, testified that it was a very slight hemorrhage or very slight fluid in the pleura, or if the pleura has not had a chance to become thickened over a sufficient length of time, the X-ray will not show it, and that a simple aspiration of the pleuro-lytic fluid cannot be diagnosed in X-ray picture. It was also claimed that plaintiff was suffering from tuberculosis, which was defined by Dr. Kaufman as an accumulation of the heart, or a rapid heart. On cross-examination, he testified that she suffered from shock, caused by loss of blood. He stated that one of the symptoms of shock is slow pulse. Defendant argues that this testimony is contradictory in that it shows the patient as having a slow pulse and a rapid heart beat at the same time. Defendant also points out that Dr. Kaufman testified that plaintiff's blood pressure was 90 over 50 diastolic, which he said was a normal rate, and that when contravened by the record of the instance that the blood pressure was 125 over 85 on the same day that she came in, said that this was normal. Plaintiff testified that she worked at "Loren's store" for 3 years before the accident, selling dresses, coats and other articles of apparel and that she worked steadily in the year prior to the accident. It developed later, however, that for 8 months she had been in California, with the exception of 2 or 3 weeks she had worked before the accident. She testified on direct examination that her average earnings were approximately \$40 a week. On cross-examination, she admitted that she made \$32 a week, and that at no time, even during the weeks around Christmas, the best in the year in that business, did she make \$40 a week. The contention of defendant as to her earnings is supported by the earning record of her employer. Defendant argues that the jury had the right to conclude, and rightfully concluded, that the injuries suffered were of a minor character and that she attempted to build up her injuries and damages far beyond their real stature.

At common law new trials were not allowed upon the ground that the damages allowed by the jury in actions in tort were insufficient. The rule in Illinois is that a new trial may be granted where the verdict is grossly inadequate, for the same reasons as those governing where the verdict is excessive. (Montgomery v. Simon, 309 Ill. App. 516.) Before the jury could award any damages to plaintiff, they first had to determine that defendant was guilty of the negligence charged, that such negligence was the proximate cause of the injuries suffered, and that <sup>she</sup> ~~was~~ in the exercise of ordinary care for her own safety at and about the time of the occurrence. The fact that the jury found the defendant guilty and awarded damages in the sum of \$300 normally would indicate that they found in her favor on the question of liability, and that they disbelieved the testimony introduced in her behalf as to her injuries. A careful perusal of the transcript convinces us that despite the effort to exaggerate plaintiff's personal injuries and loss of salary, she did suffer substantial injuries and loss of salary, and that the sum of \$300 awarded to her as damages is wholly inadequate and manifestly against the weight of the evidence. Nevertheless, we agree with the contention of the defendant that the verdict should not be set aside, and that the evidence clearly shows that plaintiff was guilty of contributory negligence which proximately caused the accident. ✓ Her testimony is that she was walking south on the crosswalk when she was struck by defendant's automobile. She admits that she did not see the automobile until the impact occurred. Defendant testified that she walked into the left door of his automobile. Her testimony corroborates the testimony of defendant in this respect. A witness introduced by plaintiff, Joseph Towelski, testified that he saw the defendant pass the street car at Diversey Avenue, a block away, that the view of the street was unobstructed, and that he was able to see the automobile coming without any trouble. The evidence clearly shows

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corroborates the testimony of defendant...  
introduced by plaintiff...  
defendant...  
the view of the street...  
the automobile coming without any trouble.

that the proximate cause of the accident was the fact that plaintiff walked into the side of defendant's automobile, coming in contact with it in the vicinity of the left front door, and that she was not in the exercise of due care for her own safety. A similar situation arose in the case of Ieley v. McClandish, 298 Ill. App. 564, where an appeal was taken by the plaintiff from a judgment of \$300 in her favor for the death of a seven year old child. Plaintiff complained of the inadequacy of the damages. The court in affirming the judgment, quoted with approval from O'Malley v. Chicago City Railway Company, 33 Ill. App. 354, 355:

"It may be conceded that the action of the jury was inconsistent, but the concession would furnish no consistent reason for inconsistency in the action of the court. \* \* \* A plaintiff, not entitled to recover at all, has no right for any reason to have a verdict for the defendant set aside. \* \* \*; nor one in his or her own favor, because the damages awarded are less than the pecuniary injury."

In overruling the motion for a new trial in the instant case, the trial judge remarked: "Now, in some of the earlier cases where they have questioned the allowance for a new trial on the inadequacy of the damages, and held where it was not improper to deny the new trial on the question of liability, Judge Gary very aptly said, as far back as 31 [33] Appellate, that if the verdict is inconsistent because of the inadequacy of the damages it would not be wise to add another inconsistency to grant a new trial where the plaintiff was exceedingly fortunate in getting any amount of damage. I think, in view of these facts, I will deny the motion for a new trial." The evidence does not show that the defendant is liable. However, he is not asking for any relief from the judgment, and we are of the opinion that substantial justice will be accomplished by allowing the judgment to stand.

Plaintiff also argues that the court erred in sustaining objections to hypothetical questions propounded to her medical witness, and that the jury was influenced by passion and prejudice in their deliberations and in arriving at their verdict. Having found that

that the proximate cause of the accident was the plaintiff's negligence, coming in contact with it in the vicinity of the left front door, and that the defendant was negligent in the exercise of due care for her own safety. In the case of Leary v. McLaughlin, 254 Ill. App. 3d 554, where an appeal was taken by the plaintiff from a judgment of \$500 in her favor for the death of a seven year old child. The plaintiff presented evidence of the inadequacy of the damages. The court in affirming the judgment, stated with approval from Winkley v. Chicago City & County Board, 33 Ill. App. 3d 554, 555:

"It may be conceded that the action of the jury was inconsistent, but the concession would furnish no constitutional reason for reversal. In the action of the court, the plaintiff was entitled to recover at all, and no right to set aside the verdict for the defendant was established. The damages awarded are not excessive in any way."

In overruling the motion for a new trial in the instant case, the trial judge remarked: "Now, in some of the earlier cases, they have questioned the allowance for a new trial on the basis of the damages, and held where it was a hardship to grant the new trial on the question of liability, judgment was very often set aside, and the case as 31 [33] appellate, that if the verdict is inconsistent because of the inadequacy of the damages it would not be wise to set it aside. Inconsistency to grant a new trial where the plaintiff was exceedingly fortunate in getting any amount of damages. I think, in view of these facts, I will deny the motion for a new trial." The witness does not show that the defendant is liable. However, he is not entitled for any relief from the judgment, and as one of the reasons that underlies justice will be accomplished by allowing the judgment to stand.

Plaintiff also argues that the court erred in sustaining objections to hypothetical questions propounded to her without answer, and that the jury was influenced by passion and prejudice in their deliberations and in arriving at their verdict. Having found that



the evidence shows that the proximate cause of the injuries suffered was plaintiff's own negligence, it is unnecessary for us to discuss these points. Plaintiff also complains of the action of the court in striking that part of her complaint which charged the defendant with wilful and wanton conduct. We agree with the defendant that there was no evidence tending to support the charge of wilful and wanton conduct, and the court properly struck that part of her complaint.

Because of the views expressed, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND KILEY, JJ. CONCUR.

The evidence shows that the words in issue of the subject's statement were Plaintiff's own realization, it is unnecessary for us to discuss these points. Plaintiff also complains of the action of the court in striking the part of her complaint which shows her conduct in violation of the law and in violation of the law. It is not the duty of the court to strike the part of her complaint which shows her conduct in violation of the law and in violation of the law. There was no evidence tending to support the charge of Plaintiff's conduct, and the court properly struck that part of her complaint. Because of the views expressed by the majority of the Superior Court of Cook County is affirmed.

JUDGES OF THE COURT.

RECEIVED AND FILED, 11. 10. 1904.

Ernest C. Meyer

42106

FAY WEINER,

Appellant,

v.

RICHARD M. KJELSTAD,

Appellee.

APR 21 1941

RECEIVED COURT

CY COURT.

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MR. PRESIDING JUSTICE BURR DELIVERED THE VERDICT OF THE COURT.

Fay Weiner filed a complaint in the Superior Court of Cook County against Richard M. Kjeldstad to recover damages for personal injuries growing out of an accident on April 17, 1940, at the intersection of Milwaukee and Spaulding Avenues in Chicago. The jury returned a verdict finding the defendant guilty and assessing plaintiff's damages at the sum of \$300. Plaintiff moved for a new trial and defendant moved for a judgment non obstante veredicto. Both motions were denied and judgment was entered on the verdict. Plaintiff asks that the judgment be reversed and that she be allowed a new trial.

Plaintiff's theory of the case is that she was crossing the intersection of Milwaukee and Spaulding Avenues, at the west crosswalk, in a southerly direction; that she was at all times in the exercise of due care and caution for her own safety; that the defendant, who was operating his automobile in a southeasterly direction on Milwaukee Avenue, caused his motor vehicle to run into, upon and against plaintiff; that the defendant did not blow his horn or give any signal of the approach of his automobile; that the defendant failed to keep his motor vehicle under proper and sufficient control; that the defendant was watching the plaintiff continually from the time he first saw her walking across until his automobile struck her; that he otherwise operated his automobile in a careless, negligent and reckless manner and so as to exhibit wilfulness and wantonness; that plaintiff was seriously and permanently injured and expended considerable sums of money in hospital and medical bills.

STATE OF ILLINOIS

Defendant,

v.

Plaintiff.

Comes now the Plaintiff,

and moves for summary judgment on the following grounds:

1. That the Defendant is the author of the following:

Cook County against Robert J. Kjelstad, a recovery judgment for

personal injuries resulting out of an accident on April 17, 1950, at

the intersection of Milwaukee and Washington Avenues in Chicago. The

jury returned a verdict finding the defendant guilty and assessing

plaintiff's damages at the sum of \$10,000. Plaintiff moved for a new

trial and defendant moved for a judgment and verdict.

Both motions were denied and judgment was entered in the verdict.

Plaintiff asks that the judgment be reversed and that she be allowed

a new trial.

Plaintiff's theory of the case is that the defendant

the intersection of Milwaukee and Washington Avenues, at the west

crosswalk, in a southerly direction; that she was at all times in

the exercise of due care and caution for her own safety; that the

defendant, who was operating his automobile in a southerly

direction on Milwaukee Avenue, caused his motor vehicle to run into,

upon and against plaintiff; that the defendant did not allow his

horn or give any signal or the approach of his automobile; that the

defendant failed to keep his motor vehicle under proper and sufficient

control; that the defendant was violating the plaintiff's continuing

from the time he first saw her walking across until his automobile

struck her; that he otherwise operated his automobile in a careless,

negligent and reckless manner and so as to exhibit willfulness and

contumacious; that plaintiff was seriously and permanently injured and

expended considerable sums of money in hospital and medical bills.

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together with substantial loss in earnings and income; that the verdict and judgment is shockingly inadequate and unjust and plainly not based upon the evidence or the law; that there is no basis in law, common sense or justice to support the amount of the verdict and judgment thereon as to the damages, and that plaintiff should have been granted a new trial; and that other errors were committed which justified the granting of a new trial. Defendant's theory of the case is that plaintiff was crossing Milwaukee Avenue going south on the west crosswalk of Spaulding Avenue; that she had a clear view to the west for about a block; that she never saw the automobile of defendant which was in full and plain view and was seen by other persons; that defendant was traveling at a reasonable speed; that he gave her warning by his horn two or three times; that he did everything he could to avoid the accident; that the plaintiff did nothing whatever to attempt to avoid the accident, and that she walked into the left front door of defendant's car; that the accident was caused solely by plaintiff's own negligence or wilful and wanton conduct; that defendant was at all times in the exercise of due care and plaintiff was not entitled to any damages; that plaintiff had no serious injuries; that the evidence as to her damages and injuries was so conflicting and so exaggerated as to lead the jury to have serious and justifiable doubts as to the truth of any of it; and that plaintiff had a fair trial, and that she had no reason to complain of receiving \$300 more than she was entitled to.

Milwaukee Avenue, a street car thoroughfare, extends northwest and southeast and is about 40 feet wide at Spaulding Avenue. Spaulding Avenue extends straight north and south and is not as wide as Milwaukee Avenue. The latter has street car tracks for both northwest and southeast bound street cars. Plaintiff, a woman 33 years of age, was walking across Milwaukee Avenue at the west crosswalk from the north to the south side of the street. At the time of the occurrence, the motor vehicle was being driven by the defendant in

together with substantially true in evidence and known; that the verdict and judgment is absolutely binding and subject to no appeal; that the evidence on the facts is not in dispute; that the law, common sense or justice is not in dispute; that the judgment thereon is not in dispute; and that the plaintiff should have been granted a new trial; and that the proper and reasonable verdict justified the granting of a new trial. Defendant's theory of the case is that plaintiff was crossing Milwaukee Avenue when south on the west crosswalk of Paulding Avenue; that she had a clear view to the west for about a block; that she never saw the automobile of defendant which was in full and plain view and was seen by other persons; that defendant was traveling at a reasonable speed; that she saw her car by his horn two or three times; that he is everything he could do to avoid the accident; that the plaintiff of normal capacity to observe to avoid the accident, and that she failed to do so; that plaintiff's of defendant's car; that the accident was caused solely by plaintiff's own negligence or willful and wanton conduct; that defendant was at all times in the exercise of due care and plaintiff was not entitled to any damages; that plaintiff had no serious injuries; that the evidence as to her damages and injuries was so conflicting and so unconvincing as to lead the jury to have various and conflicting conclusions as to the truth of any of it; and that plaintiff had a fair trial, and that she had no reason to complain of the verdict. More than she was entitled to.

Milwaukee Avenue, a street not incorporated, extends north-west and southeast and is about 40 feet wide at Paulding Avenue. Paulding Avenue extends straight north and south and is not as wide as Milwaukee Avenue. The latter has curves on both north-west and southeast bound street cars. Plaintiff, a woman 35 years of age, was walking across Milwaukee Avenue at the west crosswalk from the north to the south side of the street. At the time of the occurrence, the motor vehicle was being driven by the defendant in

a southeasterly direction on Milwaukee Avenue. On arriving at the corner, plaintiff looked both east and west. She saw a street car about a block and a half to the northwest, which was proceeding in a southeasterly direction. Automobiles proceeding in the same direction were following the street car. She testified that she did not see the automobile of defendant at any time until the accident occurred, although her view to the west was not obstructed. Plaintiff was crossing where people usually cross. She worked at "uben's Women's Apparel Shop, 1314 Milwaukee Avenue, and was crossing the street for the purpose of boarding a street car which would convey her to her place of employment. She testified she heard no horn or signal before she was struck; that she "just took a few steps and just took my eyes up and there was a machine". The next thing she remembered she was in bed in a hospital. She further testified that after leaving the sidewalk she "took three or four steps on the street and there was the machine on top of me". Answering the question, "When you say on top of you, do you mean at the point of impact?", she answered, "Yes". In answer to the question, "Do you know what part of the car came in contact with you?", she answered, "I believe it was the front fender". She was then asked, "Right or left side?", and answered, "I was going this way [indicating] and he was going this way, that side [indicating]". She was then asked, "I assume by that you mean the left side?" and she answered, "About the left door." Defendant testified that he was traveling in a southeasterly direction on Milwaukee Avenue; that he had stopped alongside of a street car at the block west of Spaulding Avenue; that he started up at the same time as the street car and passed it, and was then straddling the inner rail of the eastbound street car track; that he was going about 20 or 25 miles an hour; that he saw plaintiff start to cross the street when he was about 50 feet from Spaulding Avenue; that he then slowed down and blew his horn; that he blew his horn again and put his foot on the brakes and swerved to the right

a southeasterly direction on Illinois Avenue, that he had observed  
alongside of a street car at the block west of building corner that  
he started up at the same time as the street car and passed it, and  
was then straddling the inner rail of the second street car track;  
that he was going about 20 or 25 miles an hour; that he saw the  
start to cross the street when he was about 50 feet from  
Avenue; that he then slowed down and blew his horn; that he blew his  
horn again and put his foot on the brakes and stopped at the right  
left side?"; and answered, "I was going this way [indicating] and  
"I believe it was the front fender". He was then asked, "Right or  
know what part of the car was in contact with you?", and answered,  
"Yes". In answer to the question, "Do you  
question, "When you say on top of you, do you mean at the point of  
street and there was the machine on top of it". Answering the  
after leaving the sidewalk and "look ahead or look back on the  
remembered and was in bad in a moment". He further testified that  
just took my eyes up and there was a machine. The next thing the  
signal before and the signal; that the "just took a few steps and  
her to her place of employment. He testified the car was on  
street for the purpose of passing a street car which would convey  
women's apparel shop, that all these women, and was crossing the  
till was crossing where people usually cross. He testified that when  
occurred, although her view to the west was not obstructed. He  
not see the automatic of defendant's car until she was about 100  
direction were following the street car. He testified that the car  
a southeasterly direction. He testified the car was  
about a block and a half to the west, and was proceeding in  
normal, it would have been with the car. He testified that the car  
a southeasterly direction on Illinois Avenue, that he had observed  
alongside of a street car at the block west of building corner that  
he started up at the same time as the street car and passed it, and  
was then straddling the inner rail of the second street car track;  
that he was going about 20 or 25 miles an hour; that he saw the  
start to cross the street when he was about 50 feet from  
Avenue; that he then slowed down and blew his horn; that he blew his  
horn again and put his foot on the brakes and stopped at the right



when he was about 15 feet from her; that he realized she was going to continue on; that she walked into the left front door of the car. Walter Muehr, called by plaintiff, testified that he was employed as a janitor for a building in the vicinity; that he was 25 or 30 feet from the southwest corner at the time of the occurrence, walking south on the west crosswalk of Spaulding Avenue; that he did not see defendant's automobile until plaintiff was hit; that he heard a scream; that she was lying on the northwest bound street car tracks; that the first time he saw plaintiff was when she was lying on the ground; that he did not hear any horn blow or any signal given, and that the automobile stopped 25 or 30 feet from the scene of the accident. Joseph Towelski, another witness called by plaintiff, testified that he saw an automobile (defendant's) come from behind the street car; that the front bumper, left side of the automobile, hit the lady who was crossing the street there; that he did not hear any horn or signal. On cross-examination, this witness reiterated that "the front bumper, left side, came in contact with the girl". He further testified that the driver drove around the corner and stopped; that the view of the street was unobstructed and that he was able to see the automobile coming without trouble.

Plaintiff was taken to the Belmont Hospital, where she was treated by Dr. Saul Kaufman. When he first examined her, she was in bed in a semi-conscious state. Blood was running all over her nose, left eye and lip. Morphine and glucose solutions were injected into the veins. On the following day blood was still coming from the eye, nose and lips. The torn skin tissue above the eye was removed, the lip was sewed and the eye and lip were bandaged. Both eye tendons were brought together. There were 14 to 18 sutures put over the eye and 5 to 8 sutures in the lip. Plaintiff complains of dizziness, headaches and bad hearing in her left ear. Some of her teeth were

when he was about 15 feet from her; that he realized she was going to continue on; that she walked into the left front door of the car. Walter Kuehn, called by plaintiff, testified that he was employed as a janitor for a building in the vicinity; that he was 25 or 30 feet from the southwest corner at the time of the occurrence, walking south on the west crosswalk of Spaulding Avenue; that he did not see defendant's automobile until plaintiff was hit; that he heard a scream; that she was lying on the northwest bound street car tracks; that the first time he saw plaintiff was when she was lying on the ground; that he did not hear any horn blow or any signal given, and that the automobile stopped 25 or 30 feet from the scene of the accident. Joseph Towelski, another witness called by plaintiff, testified that he saw an automobile (defendant's) come from behind the street car; that the front bumper, left side of the automobile, hit the lady who was crossing the street there; that he did not hear any horn or signal. On cross-examination, this witness reiterated that "the front bumper, left side, came in contact with the girl". He further testified that the driver drove around the corner and stopped; that the view of the street was unobstructed and that he was able to see the automobile coming without trouble.

Plaintiff was taken to the Belmont Hospital, where she was treated by Dr. Saul Kaufman. When he first examined her, she was in bed in a semi-conscious state. Blood was running all over her nose, left eye and lip. Morphine and glucose solutions were injected into the veins. On the following day blood was still coming from the eye, nose and lips. The torn skin tissue above the eye was removed, the lip was sewed and the eye and lip were bandaged. Both eye tendons were brought together. There were 14 to 18 sutures put over the eye and 2 to 3 sutures in the lip. Plaintiff complains of dizziness, headaches and bad hearing in her left ear. Some of her teeth were

loosened in the accident. She remained in the hospital and in bed for 11 or 12 days, where she received treatment to her head, back and left leg. At the hospital she was strapped for traumatic pleurisy, and the straps were kept on about 10 days. The doctor found that she had sustained a cerebral concussion with rupture of a cerebral blood vessel, traumatic pleurisy, sprain of the sacro-illiac joint, secondary anemia and marked contusion or laceration of the left leg. After she was removed to her home the physician treated her there for about 6 weeks, giving her infra-red treatments for the chest, back, lower spine and head. For pain and sleeplessness she was given sedatives, and liver extract and tablets for anemia and the loss of blood. After being treated at her home for six weeks, she went to the doctor's office every week until the first of the following year and received treatments for the pains in her head and the anemia. She made about 80 visits to the doctor's office and was still under his care at the time of the trial. In May, 1941, Dr. Kaufman sent her to Dr. Sigmund Krumholz, a psychiatrist. She paid Dr. Kaufman \$100 on account of his bill of \$340. She received dental care of her teeth which had been loosened in the accident, and a new bridge was made to replace the one that had been broken. She was also treated in April, 1940, by a Dr. Abelio, whom she saw 3 or 4 times. She testified that she weighed 123 pounds before the accident, and that at the time of the trial she weighed 107 pounds; that she cannot see as well as before the occurrence; that before the accident she wore glasses only when she read, and that subsequent to the accident she was fitted for other glasses. She testified that she has scars on her face about the left eye and lower lip and on her left leg. She suffers from headaches and dizziness about once every week and suffers from general weakness. Dr. Kaufman testified that in his opinion the condition from which she was suffering was permanent. Plaintiff maintains that the actual expense incurred

located in the accident. He remained in the hospital and in bed for 11 or 12 days, where she received treatment to her head, back and left leg. At the hospital she was attended for traumatic pleurisy, and the efforts were kept on about 10 days. The doctor found that she had sustained a cerebral contusion with rupture of a cerebral blood vessel, traumatic pleurisy, rupture of the sacro-lumbar joint, secondary anemia and marked contusion or laceration of the left leg. After she was removed to her home the physician treated her there for about 6 weeks, giving her intra-vascular treatments for the chest, back, lower spine and head. For pain and sleeplessness she was given sedatives, and liver extract and tablets for anemia and the loss of blood. After being treated at her home for six weeks, she went to the doctor's office every week until the first of the following year and received treatments for the pains in her head and the anemia. The date about 80 visits to the doctor's office and was still under his care at the time of the trial. In May, 1941, Dr. Kaufman sent her to a licensed nurse, a psychiatrist. He paid Dr. Kaufman 100 on account of his bill of 1340. She received dental care of her teeth which had been loosened in the accident, and a new bridge was made to replace the one that had been broken. She was also treated in April, 1940, by a Dr. Heilig, whom she saw 3 or 4 times. She testified that she weighed 185 pounds before the accident, and that at the time of the trial she weighed 107 pounds; that she cannot see as well as before the occurrence; that before the accident she wore glasses only when she read, and that subsequent to the accident she was fitted for other glasses. She testified that she has scars on her face about the left eye and lower lip and on her left leg. The sutures from headwound and disfigurement once every week and sutures from general weakness. Dr. Kaufman testified that in his opinion the condition from which she was suffering was permanent. Plaintiff maintains that the actual expenses incurred

by her amounted to \$1,091.30, made up of Dr. Kaufman's bill for \$340, the hospital bill of \$139, and the loss of \$612, which she would have earned during 17-1/2 weeks at an average of \$35 a week.

Plaintiff urges that the amount of the verdict is grossly and wholly inadequate and manifestly against the weight of the evidence relative to the actual damages and losses and the physical injuries sustained by the plaintiff, and that it is obvious that the jury disregarded competent and credible testimony, ignored the court's instructions, and failed to take into consideration proper elements of damages clearly proven. In reply to this contention defendant asserts that the verdict was not inadequate; that plaintiff was guilty of contributory negligence which was the proximate cause of the accident, and that as she is not entitled to recover at all, she cannot complain that the verdict in her favor is inadequate. Defendant maintains that there was a serious conflict in the evidence as to what plaintiff was suffering from, and as to whether she suffered any damage of consequence, and calls attention to the cross-examination of Dr. Kaufman, who testified that his diagnosis of secondary anemia was based on the excessive loss of blood from the areas that were bleeding. He did not recall using the hemoglobin or blood count when he made his diagnosis. When cross-examined from the hospital record, which indicated that her blood count was 90%, he conceded that this was better than normal. Other claimed ailments were traumatic pleurisy and sacroiliac sprain. Dr. Kaufman conceded that X-ray was a means of determining whether there was pneumonia or pleurisy. He did not claim to have any X-ray evidence to substantiate his claim of pleurisy, and Dr. Hansen, defendant's witness, testified that plaintiff's exhibits 2 and 4 were negative of any evidence of pathology and concurred in the statement of Dr. Kaufman that pleurisy could be seen in an X-ray film if it were in fact present. Dr. Kaufman further admitted that if there was a sprain of the sacroiliac joint, it would appear in the X-ray of the patient. He did not remember whether it

by her account to \$1,081.50, made up of \$1,000.00, which she would have the hospital bill of \$135, and the loss of \$10, which she would have earned during 17-18 weeks at an average of \$5 a week.

Plaintiff urges that the amount of the verdict is grossly

and wholly inadequate and manifestly against the weight of the

evidence relative to the actual damages and losses and the physical

injuries sustained by the plaintiff, and that it is obvious that the

jury disregarded competent and credible testimony, ignored the court's

instructions, and failed to take into consideration proper elements

of damages clearly proven. In reply to this contention defendant

asserts that the verdict was not inadequate; that plaintiff was guilty

of contributory negligence which was the proximate cause of the acci-

dent, and that as she is not entitled to recover at all, she cannot

complain that the verdict in her favor is inadequate. Defendant

maintains that there was a serious conflict in the evidence as to

what plaintiff was suffering from, and as to whether she suffered any

damage of consequence, and calls attention to the cross-examination

of Dr. Kauffman, who testified that his diagnosis of secondary anemia

was based on the excessive loss of blood from the areas that were

bleeding. He did not recall using the hemoglobin or blood count when

he made his diagnosis. When cross-examined from the hospital record,

which indicated that her blood count was 20%, he conceded that this

was better than normal. Other claimed elements were traumatic injury

and sacroiliac sprain. Dr. Kauffman conceded that X-ray was a means

of determining whether there was pneumonia or pleurisy. He did not

claim to have any X-ray evidence to substantiate his claim of pleurisy,

and Dr. Hansen, defendant's witness, testified that plaintiff's

exhibits B and C were negative of any evidence of pathology and

occurred in the statement of Dr. Kauffman that pleurisy could be seen

in an X-ray film if it were in fact present. Dr. Kauffman further

admitted that if there was a sprain of the sacroiliac joint, it would

appear in the X-ray of the patient. He did not remember whether it

appeared in the X-ray. As far as he knew, it did not. Dr. Hansen testified positively that it did not appear. It was also claimed that plaintiff was suffering from tachycardia, which was defined by Dr. Kaufman as an acceleration of the heart, or a rapid heart. On cross-examination, he testified that she suffered from shock, caused by loss of blood. He stated that one of the symptoms of shock is slow pulse. Defendant argues that this testimony is contradictory in that it shows the patient as having a slow pulse and a rapid heart beat at the same time. Defendant also points out that Dr. Kaufman testified that plaintiff's blood pressure was 90 over 60 diastolic, which he said was a normal ratio, and that when confronted by the record of the interne that the blood pressure was 128 over 82 on the same day that she came in, said that this was normal. Plaintiff testified that she worked at Huben's store for 3 years before the accident, selling dresses, coats and other articles of apparel and that she worked steadily in the year prior to the accident. It developed later, however, that for 8½ months she had been in California, with the exception of 2 or 3 weeks she had worked before the accident. She testified on direct examination that her average weekly earnings were approximately \$40 a week. On cross-examination, she admitted that she made \$22 a week, and that at no time, even during the weeks around Christmas, the best in the year in that business, did she make \$40 a week. The contention of defendant as to her earnings is supported by the earning record of her employer. Defendant argues that the jury had the right to conclude, and rightfully concluded, that the injuries suffered were of a minor character and that she attempted to build up her injuries and damages far beyond their real stature, and that because of this the verdict should not be disturbed.

At common law new trials were not allowed upon the ground that the damages allowed by the jury in actions in tort were in-

appeared in the X-ray. As far as he knew, it did not. Dr. Hansen testified positively that it did not appear. It was also claimed that plaintiff was suffering from tachycardia, which was defined by Dr. Hansen as an acceleration of the heart, or a rapid heart. On cross-examination, he testified that she suffered from shock, caused by loss of blood. He stated that one of the symptoms of shock is slow pulse. Defendant argues that this testimony is contradictory in that it shows the patient as having a slow pulse and a rapid heart beat at the same time. Defendant also points out that Dr. Hansen testified that plaintiff's blood pressure was 90 over 60 diastolic, which he said was a normal ratio, and that when confronted by the record of the intern that the blood pressure was 128 over 82 on the same day that she came in, said that this was normal. Plaintiff testified that she worked at Huben's store for 3 years before the accident, selling dresses, coats and other articles of apparel and that she worked steadily in the year prior to the accident. It developed later, however, that for 2 1/2 months she had been in California, with the exception of 2 or 3 weeks she had worked before the accident. She testified on direct examination that her average weekly earnings were approximately \$40 a week. On cross-examination, she admitted that she made \$25 a week, and that at no time, even during the weeks around Christmas, the best in the year in that business, did she make \$40 a week. The contention of defendant as to her earnings is supported by the earning record of her employer. Defendant argues that the jury had the right to conclude, and rightfully concluded, that the injuries suffered were of a minor character and that she attempted to build up her injuries and damages far beyond their real extent, and that because of this the verdict should not be disturbed. At common law new trials were not allowed upon the ground that the damages allowed by the jury in actions in tort were in-



sufficient. The rule in Illinois is that a new trial may be granted where the verdict is grossly inadequate, for the same reasons as those governing where the verdict is excessive. (Montgomery v. Simon, 309 Ill. App. 516.) Before the jury could award any damages to plaintiff, they first had to determine that defendant was guilty of the negligence charged, that such negligence was the proximate cause of the injuries suffered, and that she was in the exercise of ordinary care for her own safety at and about the time of the occurrence. The fact that the jury found the defendant guilty and awarded damages in the sum of \$300 normally would indicate that they found in her favor on the question of liability, and that they disbelieved the testimony introduced in her behalf as to her injuries. A careful perusal of the transcript convinces us that despite the effort to exaggerate plaintiff's personal injuries and loss of salary, she did suffer substantial injuries and loss of salary, and the damages of \$300 awarded to her is wholly inadequate and manifestly against the weight of the evidence. Nevertheless, we agree with the contention of the defendant that the verdict should not be set aside, and that the evidence clearly shows that plaintiff was guilty of contributory negligence which proximately caused the accident. Her testimony is that she was walking south on the crosswalk when she was struck by defendant's automobile. She admits that she did not see the automobile until the impact occurred. Defendant testified that she walked into the left door of his automobile. Her testimony corroborates the testimony of defendant in this respect. A witness introduced by plaintiff, Joseph Towelski, testified that he saw the defendant pass the street car at Diversey Avenue, a block away, that the view of the street was unobstructed, and that he was able to see the automobile coming without any trouble. The evidence clearly shows that the proximate cause of the accident was the fact that plaintiff walked into the side of defendant's automobile, coming in contact with it in the vicinity of the left front door, and that she was not

insufficient. The rule in Illinois is that a new trial may be granted where the verdict is grossly inadequate, for the same reasons as those governing where the verdict is excessive. Appelbaum v. State, 302 Ill. App. 216. Before the jury could award any amount as to liability, they first had to determine if defendant was guilty of the negligence charged, that such negligence as the proximate cause of the injuries suffered, and that she was in the exercise of ordinary care for her own safety at and about the time of the occurrence. The fact that the jury found the defendant guilty and awarded damages in the sum of \$200 normally would indicate that they found in her favor on the question of liability, and that they disbelieved the testimony introduced in her behalf as to her injuries. A careful scrutiny of the transcript convinces us that despite the effort to exaggerate plaintiff's personal injuries and loss of salary, she did suffer substantial injuries and loss of salary, and the damages of \$200 awarded to her is wholly inadequate and manifestly against the weight of the evidence. Nevertheless we agree with the contention of the defendant that the verdict should not be set aside, and that the evidence clearly shows that plaintiff was guilty of contributory negligence which proximately caused the accident. Her testimony is that she was walking south on the crosswalk when she was struck by defendant's automobile. She admits that she did not see the automobile until the impact occurred. Defendant testified that she walked into the left door of his automobile. Her testimony corroborates the testimony of defendant in this respect. A witness introduced by plaintiff, Joseph Jaworski, testified that he saw the defendant pass the street car at Ivyway Avenue, a block away, that the view of the street was unobstructed, and that he saw while to see the automobile coming without any trouble. The evidence clearly shows that the proximate cause of the accident was the fact that plaintiff walked into the side of defendant's automobile, coming in contact with it in the vicinity of the left front door, and that she was not

in the exercise of due care for her own safety. A similar situation arose in the case of Isley v. McGlandish, 289 Ill. App. 564, where an appeal was taken by the plaintiff from a judgment of \$300 in her favor for the death of a seven year old child. Plaintiff complained of the inadequacy of the damages. The court in affirming the judgment, quoted with approval from O'Malley v. Chicago City Railway Company, 33 Ill. App. 354, 355:

"It may be conceded that the action of the jury was inconsistent, but the concession would furnish no consistent reason for inconsistency in the action of the court. \* \* \* A plaintiff, not entitled to recover at all, has no right for any reason to have a verdict for the defendant set aside. \* \* \*; nor one in his or her own favor, because the damages awarded are less than the pecuniary injury."

In overruling the motion for a new trial in the instant case, the trial judge remarked: "Now, in some of the earlier cases where they have questioned the allowance for a new trial on the inadequacy of the damages, and held where it was not improper to deny the new trial on the question of liability, Judge Gary very aptly said, as far back as 31 [33] Appellate, that if the verdict is inconsistent because of the inadequacy of the damages it would not be wise to add another inconsistency to grant a new trial where the plaintiff was exceedingly fortunate in getting any amount of damage. I think, in view of these facts, I will deny the motion for a new trial". The evidence does not show that the defendant is liable. However, he is not asking for any relief from the judgment, and we are of the opinion that substantial justice will be accomplished by allowing the judgment to stand.

Plaintiff also argues that the court erred in sustaining objections to hypothetical questions propounded to her medical witnesses, and that the jury was influenced by passion and prejudice in their deliberations and in arriving at their verdict. Having found that the evidence shows that the proximate cause of the injuries suffered was plaintiff's own negligence, it is unnecessary for us

in the expertise of the jury for her own safety. In the case of Leary v. McLaughlin, 202 Ill. App. 684, where an appeal was taken by the Plaintiff from a judgment of \$500 in her favor for the death of a seven year old child. Plaintiff complained of the inadequacy of the damages. The court in affirming the judgment, quoted with approval from O'Malley v. Chicago City Water Company, 32 Ill. App. 584, 585:

"It may be conceded that the action of the jury was inconsistent, but the concession would furnish no consistent reason for inconsistency in the action of the court. Plaintiff, not entitled to recover at all, has no right for any reason to have a verdict for the defendant set aside. Plaintiff is not one in his own favor, because the damages awarded are less than the pecuniary injury."

In overruling the motion for a new trial in the instant case, the trial judge remarked: "Now, in some of the earlier cases where they have questioned the allowance for a new trial on the inadequacy of the damages, and held where it was not proper to grant the new trial on the question of liability, judges have very aptly said, as far back as 21 [32] Appellate, that if the verdict is inconsistent because of the inadequacy of the damages it would not be wise to add another inconsistency to grant a new trial where the Plaintiff was exceedingly fortunate in getting any amount of damages. I think, in view of these facts, I will deny the motion for a new trial." The evidence does not show that the defendant is liable. However, he is not asking for any relief from the judgment, and we are of the opinion that substantial justice will be accomplished by allowing the judgment to stand. Plaintiff also argues that the court erred in sustaining objections to hypothetical questions propounded to her medical witnesses, and that the jury was influenced by passion and prejudice in their deliberations and in arriving at their verdict. Having found that the evidence shows that the proximate cause of the injuries suffered was Plaintiff's own negligence, it is unnecessary for us

to discuss these points. Plaintiff also complains of the action of the court in striking that part of her complaint which charged the defendant with wilful and wanton conduct. We agree with the defendant that there was no evidence tending to support the charge of wilful and wanton conduct, and the court properly struck that part of her complaint.

Because of the views expressed, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

NEBEL AND KILEY, JJ. CONCUR.

to discuss these points. Plaintiff also complains of the action of the court in striking that part of her complaint which charged the defendant with willful and wanton conduct. He agrees with the defendant that there was no evidence tending to support the charge of willful and wanton conduct, and the court properly struck that part of her complaint.

Because of the above expressed, the judgment of the Superior Court of Cook County is affirmed.

JULIUS ROSENBERG

HENRI AND KILBY, JR. COUNSEL

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WALLACE J. GOODRICH, administrator of  
the Estate of FRANCES GOODRICH, Deceased,

Appellant,

v.

A. A. SPRAGUE, Receiver for the Chicago,  
North Shore & Milwaukee Railroad Company,  
a corporation,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

Modified Opinion

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT ON

REHEARING:

314 I.A. 671<sup>3</sup>

The petitioner, Wallace J. Goodrich, administrator of the Estate of Frances Goodrich, deceased, plaintiff below, by his Amended and Supplemental Petition for leave to Appeal (which was allowed and to which defendant-appellee filed an answer) prays this court to grant leave to appeal from the order of the Circuit Court of Cook County entered June 20, 1941, granting a new trial in this cause. Petitioner represents that on July 23, 1937, plaintiff's decedent was killed by a train operated by defendant; that on January 7, 1938, petitioner filed his complaint in the Circuit Court of Cook County against defendant-appellee; that the cause came on for jury trial and on March 7, 1939, the jury returned a verdict finding the defendant guilty and assessing plaintiff's damages at \$6,000. The defendant thereafter filed a motion for judgment notwithstanding the verdict, or for a new trial, and on June 23, 1939, the trial judge entered judgment for defendant notwithstanding the verdict, but did not rule upon the motion for new trial.

Upon a former appeal to this court, the defendant presented certain grounds for new trial. This court held, pursuant to section 68 (3)c of the Civil Practice Act, that no error appeared in the grounds urged for new trial which would entitle the defendant to a new trial, and in accordance with this holding entered judgment upon the jury's verdict. (Goodrich v. Sprague, 304 Ill. App. 556). The

WILLIAM J. GOODRICH, administrator of  
the estate of FRANCIS GOODRICH, deceased,

Appellant,

A. A. SHARBUS, Receiver for the Chicago,  
North Shore & Milwaukee Railroad Company,  
a corporation,

Respondent.

WILLIAM J. GOODRICH

MR. JUSTICE MARSHALL DELIVERED THE OPINION OF THE COURT ON

REHEARING:

The petitioner, alias J. Goodrich, administrator of the  
Estate of Francis Goodrich, deceased, plaintiff below, by his amended  
and supplemental petition for leave to appeal (which was allowed  
and to which defendant-appellee filed an answer) prays this court  
to grant leave to appeal from the order of the Circuit Court of Cook  
County entered June 20, 1941, granting a new trial in this cause.  
Petitioner represents that on July 22, 1937, plaintiff's deceased  
was killed by a train operated by defendant; that on January 7, 1938,  
petitioner filed his complaint in the Circuit Court of Cook County  
against defendant-appellee; that the cause came on for jury trial  
and on March 7, 1938, the jury returned a verdict finding the defendant  
guilty and assessing plaintiff's damages at \$5,000. The defendant  
thereafter filed a motion for judgment notwithstanding the verdict,  
or for a new trial, and on June 28, 1938, the trial judge entered  
judgment for defendant notwithstanding the verdict, but did not rule  
upon the motion for new trial.

Upon a former appeal to this court, the defendant presented  
certain grounds for new trial. This court held, pursuant to section  
68 (3) of the Civil Practice Act, that no error appeared in the  
grounds urged for new trial which would entitle the defendant to a  
new trial, and in accordance with this holding entered judgment upon  
the jury's verdict. (Goodrich v. Sharbus, 304 Ill. App. 1888). The



defendant thereafter sued out a writ of error in the Supreme Court of Illinois, contending inter alia, that section 68 (3)c was unconstitutional in so far as it authorized the Appellate Court to pass upon grounds for new trial which had not been ruled upon by the trial court. The Supreme Court held that such action was not within the appellate jurisdiction of the Appellate Court and that the case must be remanded to the trial court to pass upon the motion for new trial. The Supreme Court affirmed the decision of the Appellate Court in reversing the judgment notwithstanding the verdict and held that the case was properly submitted to the jury. (Goodrich v. Sprague, 376 Ill. 80).

Upon reinstatement and redocketing in the Circuit Court, the motion for new trial was considered on June 30, 1941 by the trial judge, who granted the motion for new trial.

From the facts and testimony concerning this accident, it appears that the deceased was killed by a train operated by the defendant in the Village of Glenoco, where Woodlawn Avenue crosses at grade the tracks of both the North Shore Electric Railroad and the Chicago and Northwestern steam railroad. Both sets of tracks at this point are parallel and run nearly north and south; Woodlawn Avenue runs nearly east and west, intersecting the railroad tracks at an angle. The double tracks of the two railroads run parallel to each other from Harbor Street, which is about 1228 feet north of Woodlawn Avenue, to a point 878 feet south of Woodlawn Avenue, where the Northwestern tracks continue south, and the North Shore tracks curve to the east. At the Woodlawn Avenue crossing the distance between the two sets of tracks is 53 feet. The tracks of the Northwestern lie to the west and are on a higher elevation than the North Shore tracks, the difference in elevation being 3 feet 6½ inches. On the north side of Woodlawn Avenue are the North Shore passenger station platforms, which stations the local North Shore trains use, but which is not used by the express and special trains. The station

defendant thereafter sued for a writ of error in the Supreme Court of Illinois, contending that after the action of the appellate court to grant a new trial which had been taken upon by the trial court. The Supreme Court held that such action was not within the appellate jurisdiction of the appellate court and that the case must be remanded to the trial court to pass upon the motion for new trial. The Supreme Court affirmed the decision of the appellate court in reversing the judgment notwithstanding the verdict and held that the case was properly submitted to the jury. (*Woodlawn v. Chicago & Northwestern*, 378 Ill. 601.)

Upon remandment and rehearing in the Circuit Court, the motion for new trial was considered on June 20, 1931 by the trial judge, who granted the motion for new trial.

From the facts and testimony concerning this accident, it appears that the deceased was killed by a train operated by the defendant in the Village of Chicago, where Woodlawn Avenue crosses at grade the tracks of both the North Shore Electric Railroad and the Chicago and Northwestern steam railroad. Both sets of tracks at this point are parallel and run nearly north and south; Woodlawn Avenue runs nearly east and west, intersecting the railroad tracks at an angle. The double tracks of the two railroads run parallel to each other from Harbor Street, which is about 1828 feet north of Woodlawn Avenue, to a point 878 feet south of Woodlawn Avenue, where the Northwestern tracks continue south, and the North Shore tracks curve to the east. At the Woodlawn Avenue crossing the distance between the two sets of tracks is 65 feet. The tracks of the North Shore Electric Railroad are on a higher elevation than the North Shore tracks, the difference in elevation being 3 feet 6 inches. On the north side of Woodlawn Avenue are the North Shore passenger station platforms, which stations the local North Shore trains use, but which is not used by the express and special trains. The station

for Northwestern steam trains is at Hubbard Woods, south of Woodlawn Avenue.

The neighborhood east of the tracks is residential, with about four dwellings to the acre and one or two parks. One of these parks extends south from Woodlawn Avenue adjacent to the North Shore right of way, and is used as a playground for children. The right of way owned by the North Shore from Woodlawn Avenue to the south extends 52 feet east of the east rail. There are poles, brush, shrubbery and trees on this right of way extending all the way from Woodlawn Avenue to Scott Avenue, the line of poles being about seven feet east of the east rail and the line of trees about 10 or 12 feet further east, ranging from 17 to 20 feet east of the North Shore tracks. There is some conflict in the evidence as to how close the shrubbery and brush was to the east rail. Plaintiff's picture, Exhibit 3, taken on the day of the accident, and the testimony of plaintiff's witnesses, evidence that there was a heavy growth of shrubbery extending fully as far west as the line of poles, and also some bushes between the poles and the tracks, for the defendant, the motorman, Schmidt, testified that the brush and shrubbery were about twenty feet from the rail. Defendant's exhibits show less brush and shrubbery than plaintiff's evidence indicated, but these pictures were taken on July 28, 1937, five days after the accident and two witnesses testified that these photographs did not correctly portray the crossing as it was on July 23, 1937 because brush and shrubbery had been removed a few days after the event.

There are no gates at the crossing. The warning system consists of four signal posts. All four have flashing red lights and two have bells in addition. For convenience, these posts are herein designated respectively, A, B, C and D. Signal post A is located on the north side of Woodlawn Avenue, just east of the North Shore tracks, and is equipped with both a bell and a flasher. Signal post B is on the south side of Woodlawn Avenue, between the tracks of the two

for Northwestern street crossing is at approximately 100 feet west of Woodlawn Avenue.

The neighborhood east of the tracks is residential, with about four dwellings to the east and one or two more. One of these parks extends south from Woodlawn Avenue adjacent to the Western Avenue right of way, and is used as a playground for children. The right of way owned by the North Shore from Woodlawn Avenue to the south extends 50 feet east of the east rail. Within the class, brush, shrubbery and trees on this right of way extending all the way from Woodlawn Avenue to Court Avenue, the line of poles being about 100 feet east of the east rail and timing of trees about 10 or 15 feet further east, ranging from 17 to 20 feet east of the North Shore tracks. There is some conflict in the evidence as to how close the shrubbery and brush was to the east rail. Plaintiff's witness, Exhibit 5, taken on the day of the accident, and the testimony of Plaintiff's witnesses, evidence that there was a heavy growth of shrubbery extending fully as far west as the line of poles, and also some bushes between the poles and the tracks, for the defendant, the motorist, Schmidt, testified that the brush and shrubbery was about twenty feet from the rail. Defendant's exhibits show less brush and shrubbery than Plaintiff's witness indicated, but these witnesses were taken on July 22, 1937, five days after the accident and two witnesses testified that these photographs did not correctly portray the crossing as it was on July 22, 1937 because brush and shrubbery had been removed a few days after the event. There are no poles at the crossing. The warning system consists of four signal posts. All four have flashing red lights and two have bells in addition. For convenience, these posts are herein designated respectively, A, B, C and D. Signal post A is located on the north side of Woodlawn Avenue, just east of the North Shore tracks, and is equipped with both a bell and a flasher. Signal post B is on the south side of Woodlawn Avenue, between the tracks of the two

railroads, but closer to the North Shore tracks. It has a flasher but no bell. Signal post C is on the north side of Woodlawn Avenue, between the two sets of tracks, but closer to the Northwestern tracks, and likewise has a flasher but no bell. Signal post D is located on the south side of Woodlawn Avenue, west of the Northwestern tracks, and like post A has both bell and flasher. Thus, the two outside posts have both bells and flashers, while the two inside posts have flashers only. These signals operate as follows. When trains are approaching the crossing on both lines, all four signals operate. If only a North Shore train is approaching, then only signal posts A, B and D operate; signal post C does not operate. If only a Northwestern train is approaching, then signals A, C and D operate and signal post B does not. That is, signal post A and D (the ones with the bells) operate whenever a train is approaching the crossing on either railroad; signal post B is actuated only by North Shore trains.

These signals are operated automatically, by means of electricity. When a train crosses a certain point in the rail, known as a cut-in point, the signals begin to function. The cut-in point for Northbound trains on the North Shore tracks is located 1160 feet south of the Woodlawn Avenue crossing; this point is south of the curve in the North Shore tracks. The cut-in point for northbound trains on the Northwestern tracks is 3072 feet south of the crossing which is south of the Hubbard Woods station.

This accident happened on July 23, 1937, at about 8:00 P. M. daylight saving time. It was a clear day; the sun was out but beginning to set. Decedent approached the crossing from the east, on the south sidewalk. She was going slowly, and gradually slowed down her bicycle until she came to a stop with one foot on the pedal of her bicycle and the other on the ground. The front wheel of her bicycle was either just touching the rail or just short of it. The bells at the crossing were ringing as she approached prior to the impact, due in part at least to the presence of a Northwestern steam train, headed north standing at the Hubbard Woods station. Just

railroads, but almost to the north end of the island, where a flasher and  
no bell. Signal post 1 is on the south side of the island, and  
between the two sets of tracks, but almost to the north end of the island,  
and likewise has a flasher but no bell. Signal post 2 is located on  
the south side of Godhavn Avenue, west of the intersection of the  
and like post 1 has both bell and flasher. Thus, the two outside  
tracks have both bell and flasher, while the two inside tracks have  
flashers only. These signals operate as follows. When trains are  
approaching the crossing on both lines, all four signals operate. If  
only a North shore train is approaching, then only signal posts 1, 2  
and 3 operate; signal post 4 does not operate. If only a Southwestern  
train is approaching, then signals 1, 2 and 4 operate and signal post  
3 does not. That is, signal post 1 and 2 (the ones with the bells)  
operate whenever a train is approaching the crossing on either railway;  
signal post 3 is actuated only by North shore trains.

These signals are operated automatically, by means of  
electricity. When a train crosses a certain point in the rail, known  
as a cut-in point, the signals begin to function. The cut-in point  
for Southwestern trains on the North shore track is located 1150 feet  
south of the Godhavn Avenue crossing; this point is south of the  
curve in the North shore track. The cut-in point for Southwestern  
trains on the Southwestern track is 1000 feet south of the crossing,  
which is south of the Hubbard road station.

This accident happened on July 25, 1937, at about 6:00 P. M.  
daylight saving time. It was a clear day; the sun was out but  
beginning to set. Passenger approached the crossing from the west,  
on the south side. The car going slowly, and gradually slowed  
down her bicycle until she came to a stop with one foot on the pedal  
of her bicycle and the other on the ground. The front wheel of her  
bicycle was either just touching the rail or just above it. The  
bells at the crossing were ringing as she approached when the  
impact, due in part at least to the presence of a Northwestern steam  
train, headed north standing at the Hubbard road station. Just

before the train hit decedent she made an unsuccessful attempt to move back, but it was too late.

There is a conflict in the evidence as to how long decedent was at the track before she was hit; whether or not the train whistle was blown; how fast the train was going; and how far the train traveled after the brakes were applied. Witnesses Sullivan and Mrs. Turner, eye witnesses to the occurrence, testified that decedent was in a stationary position for fifteen to thirty seconds before she was hit. Curby, another eye witness, corroborated this; he further testified that he saw the girl waiting there, and after the train rounded the curve at Scott Avenue he arose from his seat, moved to the edge of the platform and waved his hand up and down four or five times as a signal to the motorman to blow his whistle. The motorman, Schmidt, testified that he did not see decedent until he was about 150 feet from the crossing at which time she emerged from behind a tree; she kept coming and stopped near the rail and was only there a very few seconds before he hit her. The witness Sullivan testified that no whistle was blown until just about the moment of impact and Curby said he heard no whistle at all before the crash. Motorman, Schmidt, testified that he blew four or five short blasts on the whistle as soon as he saw decedent at which time he was 150 feet from the crossing. The testimony of other members of the train crew (who were on duty in the coaches) tended to corroborate Schmidt's testimony as to the distance of the train from the crossing when the whistle was blown, but they heard only one blast of the whistle.

There was evidence that the speed of the train was about 40 or 45 miles per hour, and the witness, Tanney, testified that it was possible that the train was going 45 to 50 miles per hour but that he doubted it. There is a conflict in the evidence as to how far the train traveled after the accident. Witness Sullivan testified that there were five cars in the train and that it ran  $2\frac{1}{2}$  to 3 times its length after the accident. Curby agreed that it was a four or five

before the trial in his testimony that he saw the train at  
move back, and it was not  
There is a conflict in the testimony of the witnesses  
was at the time before the accident; and the train  
whistle was blown; but the train was not at the time  
train traveled after the accident was blown. The witness  
and Mr. Murphy, who witnessed the accident, testified that  
deceased was in a stationary position for fifteen to thirty seconds  
before she was hit. Murphy, another witness, corroborated this  
he further testified that he saw the first whistle blown, and after  
the train rounded the curve at that point he saw the train  
moved to the edge of the tracks and waved his hand up and down  
four or five times as a signal to the witnesses to blow his whistle.  
The motorman, Chas. J. Murphy, testified that he did not see the train until  
he was about 100 feet from the crossing, at which time the engine was  
behind a tree; the next second the engine came out and was only  
there a very few seconds before he hit her. The witness testified  
testified that no whistle was blown until just about the moment at  
instant and Murphy said he heard no whistle at all before the crash.  
Motorman, Chas. J. Murphy, testified that he did not see the train until  
the whistle was blown as he saw deceased at which time he was 100 feet  
from the crossing. The testimony of other witnesses of the train crew  
(who were on duty in the engine) tended to corroborate Murphy's  
testimony as to the distance of the train from the crossing when the  
whistle was blown, but they heard only one blast of the whistle.  
There was evidence that the speed of the train was about 40  
or 45 miles per hour, and the witness, Murphy, testified that it was  
possible that the train was going 45 to 50 miles per hour but that he  
doubted it. There is a conflict in the evidence as to how far the  
train traveled after the accident. The witness testified that  
there were five cars in the train and that it was 15 to 20 feet in  
length after the accident. Murphy agreed that it was a four or five



car train. The length of a car is about 60 feet. The members of the train crew testified that the train was composed of three cars and that it traveled about 500 feet from the point where the brakes were applied to the point where the train came to a stop.

Mrs. Goodrich, mother of decedent, and a school teacher, both testified regarding decedent's age, experience, intelligence and capacity. At her death, she was 11 years and 3 months old, and was about four feet eleven inches tall; her hearing and sight were normal; she was a good student, alert and interested in everything, and was a little above the average in intelligence and capacity; she took part in plays, singing, swimming, art and dancing. She had been riding a bicycle since she was seven years of age, but it had been only a few months since she had gone any distance from her home, which was in Winnetka, about one block west of the tracks. Decedent had some friends who lived east of the tracks some blocks to the south of Woodlawn Avenue, and visited them occasionally, but most of the time she was taken there by her mother or by the mothers of her friends. She had been allowed to cross the tracks by herself for only a year. Mrs. Goodrich testified that to her knowledge the only crossing her daughter had crossed on a bicycle was El Dorado Avenue in Winnetka, which crosses the tracks of both railroads, and that the El Dorado Avenue crossing is protected by gates.

The motion for new trial alleges in general terms that the trial court erred in excluding proper evidence offered by defendant and in admitting improper evidence offered by plaintiff.

The Supreme court, in passing upon the questions involved in Goodrich v. Burague, 376 Ill. 60, said:

"Viewed in the light of the rule that if evidence supporting plaintiff's claim appears in the record the cause should be submitted to a jury, we are of the opinion that such evidence exists in this record, and unless it can be said that deceased was guilty of contributory negligence, as a matter of law, which we do not think can be said on this record, the issues of negligence and contributory negligence are questions that were properly submitted to the jury."

Further, the court there said in its opinion;

car train. The length of a car is about 60 feet. The members of the train crew testified that the train was composed of three cars and that it traveled about 600 feet from the point where the brakes were applied to the point where the train came to a stop.

Mrs. Goodrich, mother of deceased, and a school teacher, both testified regarding deceased's age, experience, intelligence and capacity. At her death, she was 11 years and 5 months old, and was about four feet eleven inches tall; her hearing and sight were normal; she was a good student, alert and interested in everything, and was a little above the average in intelligence and capacity; she took part in plays, singing, swimming, art and dancing. She had been riding a bicycle since she was seven years of age, but it had been only a few months since she had gone any distance from her home, which was in Winnetka, about one block west of the tracks. Deceased had some friends who lived east of the tracks some blocks to the south of Woodlawn Avenue, and visited them occasionally, but most of the time she was taken there by her mother or by the mother of her friends. She had been allowed to cross the tracks by herself for only a year. Mrs. Goodrich testified that to her knowledge the only crossing her daughter had crossed on a bicycle was at Woodlawn Avenue in Winnetka, which crosses the tracks of both railroads, and that the El Dorado Avenue crossing is protected by gates.

The motion for new trial alleges in general terms that the trial court erred in excluding proper evidence offered by defendant and in admitting improper evidence offered by plaintiff. The Supreme court, in passing upon the questions involved in Goodrich v. Lawrence, 278 Ill. 30, said:

"I viewed in the light of the rule that if evidence supporting plaintiff's claim appears in the record the same should be admitted to a jury, we are of the opinion that such evidence relates in this record, and unless it can be said that deceased was guilty of contributory negligence, as a matter of law, which we do not think can be said on this record, the issues of negligence and contributory negligence are questions that were properly submitted to the jury."

Further, the court there said in its opinion:

"Photographs were introduced in evidence showing the condition of the right of way of the 'North-Shore' electric lines. There is evidence in the record that trees and shrubs grew to within 10 or 15 feet of the east side of the east track, immediately south of Woodlawn Avenue. Its right-of-way there extended 30 feet east of the east track. The statute required that it clear its right-of-way of trees and shrubs for a distance of 500 feet on either side of a crossing. This means all the width of its right-of-way. That was not done in this case."

Upon this question, defendant's counsel made the statement that "the east right-of-way line of the Chicago North Shore & Milwaukee Railroad Company, south of Woodlawn Avenue is 52 feet east of the east rail of the northbound tracks. This plat shows a line of trees 20 feet east of the east rail of the north bound tracks of the Chicago, North Shore & Milwaukee Railroad Company, as shown on this plat". It clearly appears that brush, shrubbery and trees grew on defendant's right-of-way south of Woodlawn Avenue. Mr. Young, Village Manager of Glencoe, testified that a line of poles stretched along the right-of-way at about 7 feet from the east rail of the North Shore tracks and that the line of trees was 10 or 12 feet farther east than the poles. These trees were poplars or cottonwoods with low hanging branches, and the underbrush extended as far west at the line of trees, if not a little farther. Other witnesses testified that the bushes and shrubbery extended right up to the telephone poles, and that there were bushes between the poles and the tracks.

The purpose of the statute requiring that rights-of-way be cleared near crossings seems clearly to have been to (1) enable the motorman to see people at or near the tracks, and (2) afford to people approaching the crossing an unobstructed view of the tracks and crossing. The Supreme Court, *Goodrich v. Sprague*, (*supra*), further said;

"There is evidence that one approaching the crossing from the east on the south side of Woodlawn Avenue, as did the deceased, would have to come within a comparatively few feet of the northbound track before having a clear view for any considerable distance down the track."

There is also the testimony given by the motorman that he "didn't see her until she came out from behind a tree there. That tree

"Photographs were introduced in evidence showing the condition of the right-of-way of the 'North-west' electric line. There is evidence in the record that there are bushes on the right-of-way of the east side of the east track, immediately south of 'Columbia Avenue'. The right-of-way there is 10 feet wide of the east track. The witness testified that it is the right-of-way of trees and shrubs for a distance of 100 feet or more, and that the right-of-way of the highway, and that the right-of-way of the crossing, was not done in this case."

Upon this question, defendant's counsel asked the witness that the east right-of-way line of the Chicago River was a line between the Company, south of Columbia Avenue as a line of trees to the of the northward track. The witness moved a line of trees to the east of the east rail of the north-bound track of the highway, and North there a distance of 100 feet, as shown on this map. It clearly appears that bushes, shrubs and trees were on defendant's right-of-way south of Columbia Avenue. The witness testified that a line of poles was located along the right-of-way at about 7 feet from the east rail of the track, there being and that the line of trees was 10 or 12 feet further east than the poles. These trees were located on defendant's right-of-way, bushes, and the underbrush extended to the east of the line of trees, if not a little further. Other witnesses testified that the bushes and shrubs extended right up to the Jackson street, and that there were bushes between the poles and the tracks.

The purpose of the statute requiring that right-of-way be cleared near crossings seems clearly to have been to (1) enable the motorist to see people at or near the tracks, and (2) allow people approaching the crossing an unobstructed view of the tracks and crossing. The witness testified that, (above), further said:

"There is evidence that one approaching the crossing from the east on the south side of Columbia Avenue, as this was denoted, would have to come within a comparatively few feet of the northward track before having a clear view for any considerable distance down the track."

There is also the testimony given by the motorist that he did not see her until she came out from behind a tree there. This tree

stands about fifteen or twenty feet from the east rail of the north-bound track. I first saw her when she came from behind that tree. The moment I saw her I jumped up and took my hand off the power and threw the train in emergency . . . . I could have done nothing else to stop the train . . . . A large tree prevented me from seeing the little girl before the time when she was 15 feet from the rail . . . . I saw her just as she emerged from behind that tree. What prevented me from seeing her before she got to that tree were the trees further back which obstructed the view. There are trees all along there obstructing the view". There were other witnesses who testified that decedent was in a stationary position, with her bicycle wheel very close the east rail, for a period of fifteen to thirty seconds. It appears also that the space of 53 feet between the two railroads gives ample space to stand in safety. The local passenger station for south bound trains is located in that space, and, since people can wait in safety between the two railroads, there is an inducement to a pedestrian or cyclist to regard each set of tracks as separate crossings, and it was natural for decedent to approach the track to see if a train was coming on the North Shore track. There is evidence that the signals were operating about the time when decedent approached the track. There was a Northwestern train standing at Hubbard Woods station, which caused the bells to ring, and which had been standing there for at least five minutes before decedent stopped at the crossing. Signal post B, which was in decedent's direct line of vision, did not start to flash until after she came to a stop. It appears from the evidence that decedent looked south toward the Northwestern train standing at the Hubbard Woods station, which logically enough was the reason for the ringing of the bells, and strengthened the conclusion reached from the non-operation of signal post B that no North Shore train was approaching. When the signal on post B finally did begin to flash, it escaped decedent's attention for the change it created in the surroundings was slight and hardly noticeable in

stands about fifteen or twenty feet from the wall of the north-bound track. I first saw her when she came from behind that tree. The moment I saw her I jumped up and took my hand off the wheel and threw the train in emergency. . . . I could have done nothing else to stop the train. . . . A large tree prevented me from seeing the little girl before the time when she was hit from the left. . . . I saw her just as she emerged from behind that tree. . . . and prevented me from seeing her before she got to the tree where the train further back which obstructed the view. There are trees all along there obstructing the view. There were other witnesses who testified that descendant was in a stationary position, with her sleeve wheel very close the east wall, for a period of fifteen to thirty seconds. It appears also that the space of 55 feet between the two railroads gives ample space to stand in safety. The local passenger station for south bound trains is located in this space, and, since people can wait in safety between the two railroads, there is no impediment to a passenger or cyclist to get to each end of track as separate crossings, and it was natural for descendant to march the track to see if a train was coming on the north bound track. There is evidence that the signals were operating about the time when descendant approached the track. There was a Northwestern train standing at Hubbard code station, which caused the bells to ring, and which had been standing there for at least five minutes before descendant stopped at the crossing. Signal post B, which was in descendant's direct line of vision, did not start to flash until after she came to a stop. It appears from the evidence that descendant looked north toward the Northwestern train standing at the Hubbard code station, which logically enough was the reason for the ringing of the bells, and strengthened the conclusion reached from the non-operation of signal post B that no North Shore train was approaching. When the signal on post B finally did begin to flash, it escaped descendant's attention for the change it created in the surroundings was slight and hardly noticeable in

view of the Northwestern train and the continuous ringing of the bells. It would appear, as suggested, that because of defendant's violation of the statute it was impossible for decedent to look south down the North Shore tracks due to the curve of the tracks without placing herself in a position of danger. There was a heavy growth of shrubbery extending as far west as the line of telephone poles and there were some bushes between the poles and the track. The line of telephone poles was only 7 feet from the east rail, and, due to the overhang of the car from the rail and the distance from the seat of the bicycle to the front wheel, six feet from the tracks was the minimum point of safety for decedent. There were no gates or barriers. The sidewalk crosses the tracks at grade, with smooth boards flush with the rails; a child would not be able to see where the tracks were, without putting herself within the danger zone. It appears from the facts detailed that defendant violated the statute and that decedent's view was obscured in such manner as could have caused her unwittingly to place herself in a position of danger in order to determine whether a train was coming.

Defendant contends, however, that since there were signals decedent was bound to heed them, and that if she did not do so, her death was not the proximate result of the violation of the statute. In this regard, even though the crossing was so laid out and the signal system so constructed that it was reasonably to be expected that decedent would approach the crossing to see if a train were coming, still, the legislative purpose in enacting the brush statute was to ensure to the public, using that crossing, the benefit of a clear view, in addition to any other warning devices which the railroad might erect. That defendant violated the statute is sustained by the facts in evidence, as well as being the fixed law in this case by the decision of the Supreme Court. (Goodrich v. Sprague, supra).

There is ample evidence in the record from disinterested witnesses from which the jury could find that decedent and her bicycle

view of the northeastern main and the southern main of the bridge. It would appear, however, that because of defendant's violation of the statute it was impossible for defendant to have seen the North Shore bridge due to the curve of the bridge without leaving herself in a position of danger. There was a heavy growth of shrubbery extending as far west as the line of the bridge. The line of the bridge some bushes between the poles and the track. The line of the bridge poles was only 7 feet from the east rail, and, due to the overhang of the car from the rail and the distance from the east of the bridge to the front wheel, six feet from the track, the minimum point of safety for defendant. There were no signs or markers. The highway crosses the tracks at grade, with smooth double flange with the rails; a child would not be able to see where the curve were, without realizing herself within the danger zone. It is noted from the facts detailed that defendant violated the statute and that defendant's view was obscured in such manner as could have caused her unwittingly to place herself in a position of danger in order to determine whether a train was coming.

Defendant contends, however, that since there were signals defendant was bound to heed them, and that if she did not do so, her death was not the proximate result of her violation of the statute. In this regard, even though the crossing was so laid out and the signal system so constructed that it was reasonably to be expected that defendant would approach the crossing to see if a train were coming still, the legislative purpose in enacting the statute was to secure to the public, using that crossing, the benefit of a clear view, in addition to any other warning devices which the railroad might erect. That defendant violated the statute is established by the facts in evidence, as well as being the fixed law in this case by the decision of the Supreme Court. (Hodgson v. Iowa, 1904).

There is ample evidence in the record from disinterested witnesses from which the jury could find that defendant had her view



were in a stationary position, near the east rail, for a period of 15 to 30 seconds before she was struck. It is contended that the failure of the motorman to see decedent standing at the crossing, or his neglect to warn her of her danger, if he did see her, was negligence. It does appear that the weight of the evidence supports plaintiff's position. There is a question as to when the motorman saw decedent. If he saw her as soon as he rounded the curve at Scott Avenue, he was negligent in not blowing his whistle in time to warn her. There is also some conflict as to when the whistle was actually blown. All of defendant's witnesses, it seems, conceded that no whistle was blown until the train was 150 feet from the crossing. Indeed, all the evidence shows negligent failure to blow the whistle in time to avoid the accident. If the motorman did not see decedent until he was almost upon her, it was because his view of the crossing was obstructed by the trees and shrubbery. These facts were before the jury and it was for the jury to say whether the motorman properly signaled. The fact is that the motorman failed to blow his whistle while decedent was stationary at the crossing for 15 to 30 seconds, and can be accounted for in three ways; first, he wasn't looking; second, he saw her, but still failed to warn her; third, he was prevented from seeing her by the trees and shrubbery which were admittedly on the right of way in violation of statute. It would appear from the facts that the greater weight of the evidence indicates that there was negligence in not giving the required warning.

The next thing we have to consider is the speed of the train at the time. The rate of speed at which a train may be operated depends on the peculiar facts of each individual case, and, whether or not a given rate of speed is negligent, is a question of fact for the jury, unless the court is of the opinion that as a matter of law, under the facts of the particular case, no reasonable jury could find the speed unreasonable. (Landen v. Chicago & G. T. Ry., 92 Ill. App. 216; Brundage v. Chicago, B. & O. R. R., 245 Ill. App. 440).

were in a stationary position, near the east rail, for a period of 15 to 30 seconds before the accident. It is contended that the failure of the motorist to see defendant's car at the crossing, or his neglect to warn her of her danger, if he did see her, was negligence. It does appear that the weight of the evidence supports plaintiff's position. There is a question as to when the motorist saw defendant. If he saw her as soon as he rounded the curve at West Avenue, he was negligent in not blowing his whistle in time to warn her. There is also some conflict as to when the whistle was actually blown. All of defendant's witnesses, it seems, conceded that no whistle was blown until the train was 100 feet from the crossing. Indeed, all the evidence shows negligent failure to blow the whistle in time to avoid the accident. If the motorist did not see defendant until he was almost upon her, it was because his view of the crossing was obstructed by the trees and shrubbery. These facts were before the jury and it was for the jury to say whether the motorist properly signaled. The fact is that the motorist failed to blow his whistle while defendant was stationary at the crossing for 15 to 30 seconds, and can be accounted for in three ways; first, he wasn't looking; second, he saw her, but still failed to warn her; third, he was prevented from seeing her by the trees and shrubbery which were admittedly on the right of way in violation of statute. It would appear from the facts that the greater weight of the evidence indicates that there was negligence in not giving the required warning.

The next thing we have to consider is the speed of the train at the time. The rate of speed at which a train may be operated depends on the peculiar facts of each individual case, and, whether or not a given rate of speed is negligent, is a question of fact for the jury, unless the court is of the opinion that as a matter of law, under the facts of the particular case, no reasonable jury could find the speed unreasonable. (Landon v. Chicago & N. W. Ry., 22 Ill. App. 210; Wynshaw v. Chicago & N. W. Ry., 245 Ill. App. 450).

It appears from the evidence that all witnesses who testified estimated the speed of the train to have been at least 40 miles per hour. Several witnesses, including defendant's trainmen, estimated the speed at 40 to 45 miles. While this speed may be safe at some crossings, the jury might properly have found that such speed was not reasonable in this case where children customarily played in a park adjacent to the right of way, where the view was obstructed, the warning signals confusing, and where no warning was given by blowing a whistle. Considering these facts, which are of course matters for the jury, and which, no doubt, were considered by it in reaching the verdict of guilty and assessing plaintiff's damages in the sum of Five Thousand dollars, we find no reason for disturbing the jury's verdict.

Likewise, the question whether a child of eleven years of age is guilty of contributory negligence is a question for the jury. The decisions in this state lay down the rule that whether a child between the ages of 7 and 14 is guilty of contributory negligence in a particular case, is an open question of fact and must be left to the jury. The jury's verdict on this question should stand. Aside from the foregoing rule, it is contended that there was ample evidence in the record to show that decedent exercised that degree of care which a child of her age, capacity, intelligence and experience would have exercised under the same or similar circumstances, and it is urged by plaintiff that on the evidence, it was for the jury alone to decide whether decedent was guilty of contributory negligence, citing Chicago & Alton R. R. v. Pearson, 184 Ill. 386, and Elgin, J. & E. Ry. v. Lawler, 229 Ill. 621, and other cases.

The real question which we ought to consider in this matter is whether a new trial may be granted where the questions have been submitted to the jury to determine the weight of the evidence and credibility of the witnesses. As suggested in People v. Hanisch,

It appears from the evidence that all witnesses who testified estimated the speed of the train to have been at least 40 miles per hour. Several witnesses, including defendant's witnesses, estimated the speed at 40 to 45 miles. While this speed may be one of some consequence, the jury might properly have found that such speed was not reasonable in this case where children constantly played in a park adjacent to the right of way, where the view was obstructed, the warning signals confusing, and where no warning was given by blowing a whistle. Considering these facts, which are of course matters for the jury, and which, no doubt, were considered by it in reaching the verdict of guilty and assessing plaintiff's damages in the sum of five thousand dollars, we find no reason for disturbing the jury's verdict.

Likewise, the question whether a child of eleven years of age is guilty of contributory negligence is a question for the jury. The decision in this state lay down the rule that whether a child between the ages of 7 and 14 is guilty of contributory negligence in a particular case, is an open question of fact and must be left to the jury. The jury's verdict on this question stands aside from the foregoing rule, it is contended that there was ample evidence in the record to show that defendant exercised that degree of care which a child of her age, capacity, intelligence and experience would have exercised under the same or similar circumstances, and it is urged by plaintiff that on the evidence, it was for the jury alone to decide whether defendant was guilty of contributory negligence, citing Glenn v. Allen, 194 Ill. 388, and Ellis v. E. E. Ry. v. Leavelle, 329 Ill. 631, and other cases.

The real question which we ought to consider in this matter is whether a new trial may be granted where the questions have been submitted to the jury to determine the weight of the evidence and credibility of the witnesses. As suggested in People v. Hansen,

361 Ill. 466, the jury's verdict may not be lightly set aside. The court there said;

"Whatever may be the rule in certain other jurisdictions, we firmly adhere to our often-asserted belief that it is the province of the jury, alone, to determine the weight of the evidence and the credibility of the witnesses. If it were not so there would be little use for the jury system. The jury, as a fact-finding body, is of such importance that an abridgement of its functions in this regard and an appropriation of them by the judges would mean the forsaking of a valued tradition in our system of jurisprudence. The utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury."

See also Russell v. Richardson, 302 Ill. App. 589.

The defendant, however, cites Gavin v. Keter, 278 Ill. App. 308, on the question of whether or not there was an abuse of discretion on the part of the trial court in granting a new trial, where the court said;

"In passing upon the merits of the instant contention it must be borne in mind that this is an appeal from an order of the trial court granting a new trial. If judgment had been entered upon the verdict and the appellees were here claiming that the evidence did not warrant the verdict, the question of the preponderance of the evidence would not arise in this court and we would not be warranted in disturbing the verdict of the jury unless the verdict was clearly against the manifest weight of the evidence. But, under the new Practice Act . . . this appeal concerns the action of the trial court in granting a new trial. A trial court has more latitude than this court in passing upon the verdict of the jury. The allowance or refusal of a new trial upon the weight of the evidence is peculiarly within the discretion of the trial court and he is warranted in granting a new trial if a plaintiff has failed to sustain his claim by a preponderance of the evidence. In passing upon the question as to whether or not the trial court in such case was justified in granting a new trial, we must bear in mind that there are many things which a trial judge observes on a trial that do not appear from the printed record, - the appearance of a witness, his or her manner of testifying, and other circumstances that greatly aid the trial court in determining the credibility of a witness and the weight, if any, that should be attached to his or her testimony.

However, in considering this case, the allegations in the complaint of negligent acts on the part of the defendant must be considered, and also as to whether plaintiff has sustained any one or more of them. From the cases called to our attention the rule seems to be that a new trial should not be granted unless the verdict is manifestly against the weight of the evidence. We are of the opinion that the court erred in granting a new trial on the facts and issues here involved, and are of the opinion that plaintiff's

301 III. 403, the jury's verdict may not be lightly set aside. The court there said;

"However may be the rule in some other jurisdictions, we firmly adhere to our old rule that it is the province of the jury alone to determine the weight of the evidence and the credibility of the witnesses. It is not for the court to interfere with the jury's verdict, as a fact-finding body, in such instances as an award of a new trial. The court's function is to see that the jury is properly instructed and that the evidence is fairly presented to it. The court should not interfere with the jury's verdict on a question of fact, unless the evidence is so weak and the jury's verdict so manifestly against the weight of the evidence as to require a new trial by the court."

See also Russell v. Johnson, 301 III. 403.

The defendant, however, cites Wright v. Wright, 303 Ill. 400.

303, on the question of whether or not there was an error of law in the court's instruction on the part of the trial court in granting a new trial, where the court said;

"In passing upon the merits of the instant contention it must be borne in mind that this is an appeal from the trial court granting a new trial. It is not for the court to determine the weight of the evidence and the credibility of the witnesses, but to see that the jury is properly instructed and that the evidence is fairly presented to it. The court should not interfere with the jury's verdict on a question of fact, unless the evidence is so weak and the jury's verdict so manifestly against the weight of the evidence as to require a new trial by the court. . . . This appeal concerns the weight of the evidence and the credibility of the witnesses, which is the province of the jury alone. It is not for the court to interfere with the jury's verdict in such instances as an award of a new trial. The court's function is to see that the jury is properly instructed and that the evidence is fairly presented to it. The court should not interfere with the jury's verdict on a question of fact, unless the evidence is so weak and the jury's verdict so manifestly against the weight of the evidence as to require a new trial by the court. . . . This appeal concerns the weight of the evidence and the credibility of the witnesses, which is the province of the jury alone. It is not for the court to interfere with the jury's verdict in such instances as an award of a new trial. The court's function is to see that the jury is properly instructed and that the evidence is fairly presented to it. The court should not interfere with the jury's verdict on a question of fact, unless the evidence is so weak and the jury's verdict so manifestly against the weight of the evidence as to require a new trial by the court."

However, in considering this case, the allegations in the

complaint of negligent sale on the part of the defendant must be considered, and also as to whether plaintiff has established any one or more of them. From the cases cited to our attention the rule seems to be that a new trial should not be granted unless the verdict is manifestly against the weight of the evidence, as one of the opinions that the court erred in granting a new trial on the facts and issues here involved, and one of the opinions that plaintiff's

case was supported by a preponderance of the evidence. This conclusion we have carefully considered and under the facts and circumstances as detailed by the witnesses and exhibits offered, we conclude that there was such a preponderance of evidence for plaintiff's case which did not justify the trial court in granting a new trial.

Objection was made to the admission and exclusion of certain evidence. A section foreman employed by defendant was produced for the purpose of showing that no brush or shrubbery was cut at the scene of the accident before defendant's photographs were taken. He made certain reports of the work done by himself and his crew; he used these reports to refresh his recollection, and having refreshed his recollection testified in full as to the work done. The reports were then excluded. In regard to writings used to revive recollection, it is said in Wigmore on Evidence, 3rd Ed. vol. III, sec. 783, p. 118, "that the offering party has not the right to treat it as evidence, by reading it or showing it or handing it to the jury, is well established." In Davis v. Michigan Central R. R. Co., 294 Ill. 355, it was said that; "The entries in the book kept by the car inspector who examined the draw-bars and couplers on the day of the accident were properly excluded from the jury. A witness for plaintiff in error was permitted to testify as to all the facts contained in the entries and was permitted to refresh his memory from the entries made by him in the book kept by him. There is no rule of evidence making such entries admissible where the making of them is in no way brought in issue. They were made after the accident and were self-serving declaration."

There is also a contention made by defendant that there was error in admitting in evidence plaintiff's exhibit 3. This photograph was admitted with the following instruction to the jury;

"Now I would like to comment that in that photograph there is a superimposed - well, that is in the photograph itself, the picture of a boy and a bicycle. It appears that the Tribune Reporter from the witness stand stated that a policeman indicated to him the position of the bicycle and the little girl at the time of the accident. Now,

case was supported by a preponderance of the evidence. This conclusion we have carefully considered and under the facts and circumstances as detailed by the witnesses and exhibits offered, we conclude that there was such a preponderance of evidence for plaintiff's case which did not justify the trial court in granting a new trial.

Objection was made to the admission and exclusion of

certain evidence. A section foreman employed by defendant was produced for the purpose of showing that no brush or shrapnel was out at the scene of the accident before defendant's photographs were taken. He made certain reports of the work done by himself and his crew; he used these reports to refresh his recollection, and having refreshed his recollection testified in full as to the work done. The reports were then excluded. In regard to writings used to refresh recollection, it is said in Ignacio on Evidence, 3rd ed. vol. 11, sec. 753, p. 118, "that the offering party has not the right to treat it as evidence, by reading it or knowing it or handing it to the jury, as well established." In Davis v. Michigan Central R. Co., 284 Ill. 320, it was said that:

"The entries in the book kept by the car inspector who examined the draw-bars and couplers on the day of the accident were properly excluded from the jury. A witness for plaintiff in error was permitted to testify as to all the facts contained in the entries and was permitted to refresh his memory from the entries made by him in the book kept by him. There is no rule of evidence making such entries inadmissible where the making of them is in no way brought in issue. They were made after the accident and were self-serving declarations."

There is also a contention made by defendant that there was error in admitting in evidence plaintiff's exhibit 5. This photograph was admitted with the following instruction to the jury:

"Now I would like to comment that in that photograph there is a superimposed - well, that is in the photograph itself, the picture of a boy and a bicycle. It appears that the witness testified from the witness stand that a policeman indicated to him the position of the bicycle and the little girl at the time of the accident. Now,



the jury is to disregard entirely the position of the bicycle and the boy in the picture, because the position of the bicycle, as told to the Tribune Reporter by the policeman, is not evidence, the policeman not having been an eyewitness to the accident. Therefore, I am letting this photograph go into evidence with the admonition to the jury that they are to disregard entirely the position of the bicycle and also the persons shown in this photograph and it is admitted merely for the purpose of showing the physical surroundings."

This photograph was the only photograph showing the condition of the brush and shrubbery which was taken the same day as the occurrence, defendant's photographs having been taken five days later and there was evidence by disinterested witnesses that these pictures did not correctly show the condition of the brush and shrubbery at the time of the occurrence because it had been cut down in the intervening period. Defendant's own witness testified that on July 24th (the day after the occurrence) his crew were mowing grass along this stretch. The purpose of evidence being to get at the truth, all evidence and particularly photographic evidence which portrays the condition as it was at the moment of the occurrence, should be admitted unless there is some compelling reason in law or logic for keeping it out. There seems to have been other evidence of witnesses familiar with the right of way, who testified that the photograph correctly portrayed the conditions of the shrubbery at the time of the accident. From what appears in the record, the court did not err in admitting the photograph.

The defendant contends that there are certain errors in giving instructions requested by plaintiff and call attention to the following instruction;

"If you believe upon a preponderance of the evidence that on or about July 23, 1937, Frances Goodrich was struck and killed by a train of the defendant; and if you believe that the death of the said Frances Goodrich was proximately caused by the negligence of the defendant as charged in the complaint, then if you also find that Frances Goodrich was both before and at the time of the accident in the exercise of ordinary care for her own safety, you should find the defendant guilty."

Defendant seriously contends that the giving of similar instructions has been repeatedly held reversible error and cannot be cured by other instructions given by the court. Upon this question it is well to observe the statements made by counsel. Plaintiff's counsel stated

The jury is to disregard entirely the condition of the bicycle and the boy in the picture, because the position of the bicycle, as told to the Tribune reporter by the defendant, is not evidence. The policeman not having been an eyewitness to the accident. Therefore, I am letting this photograph go into evidence with the condition of the bicycle and also the person shown in this photograph and it is admitted merely for the purpose of showing the physical surroundings."

This photograph was the only photograph showing the condition of the brush and shrubbery which was taken the same day as the occurrence, defendant's photograph having been taken five days later and there was evidence by disinterested witnesses that these pictures did not correctly show the condition of the brush and shrubbery at the time of the occurrence because it had been cut down in the intervening period. Defendant's own witness testified that on July 25th (the day after the occurrence) his crew were working grass along this stretch. The purpose of evidence being to get at the truth, all evidence and particularly photographic evidence which portrays the condition as it was at the moment of the occurrence, should be admitted unless there is some compelling reason in law or logic for keeping it out. There seems to have been other evidence of witnesses familiar with the right of way, who testified that the photograph correctly portrayed the conditions of the shrubbery at the time of the accident. From what appears in the record, the court did not err in admitting the photograph.

The defendant contends that there are certain errors in giving instructions requested by plaintiff and call attention to the following instruction:

"If you believe upon a preponderance of the evidence that on or about July 25, 1937, Frances Goodrich was struck and killed by a train of the defendant; and if you believe that the death of the said Frances Goodrich was proximately caused by the negligence of the defendant as charged in the complaint, then if you also find that Frances Goodrich was both before and at the time of the accident in the exercise of ordinary care for her own safety, you should find the defendant guilty."

Defendant seriously contends that the giving of similar instructions has been repeatedly held reversible error and cannot be cured by other instructions given by the court. Upon this question it is well to observe the statements made by counsel. Plaintiff's counsel stated

to the jury "We claim in this case, and we expect to prove to you, that the accident was caused in a large part, if not entirely, by the fact that there was a dense thick growth of bushes and shrubbery and undergrowth right on the southeast corner, which obstructed the view of anybody here (indicating) looking south, and which we claim obstructed the view of the motorman looking north". Defendant's counsel stated;

"The charge of negligence in this declaration is -- or complaint, rather, that we ran and operated this train at a high, negligent, dangerous rate of speed. That is one charge. The second charge is that we didn't blow a whistle when approaching the crossing". It would appear, therefore, that the jury was informed of the acts of negligence charged, and that the case was tried upon the issues presented. In the case of Dickson v. Swift Co., 238 Ill. 62, it was said;

"It has never been considered reversible error to refer the jury to the declaration unless they are required to determine a question of law as to what are the material allegations. (Paternal Army v. Evans, 215 Ill. 629)."

In Helskis v. Daring Coal Co., 243 Ill. 62, where plaintiff in error complained of an instruction given by the court to the effect that defendant in error could recover if the case was proved as alleged in the declaration, the court said; "While the practice of giving such an instruction is not to be commended, it is not reversible error where every count in the declaration contains the necessary allegations for recovery". In the instant case defendant's counsel clearly indicated to the jury the charges that were made as to the operation of the train at a dangerous rate of speed and failure to blow a whistle. Although we do not altogether agree with the form of the instruction, we are of the opinion that defendant is in no position to object, having waived its right to do so by making a statement to the jury advising them of the allegations of negligence charged.

There is also some complaint made as to improper conduct of plaintiff's counsel, but we have carefully considered the matters complained of and are of opinion that there is nothing here which would justify a new trial. There was no request that a juror be

to the jury "the claim in this case, and we expect to prove to you, that the accident was caused in a large part, if not entirely, by the fact that there was a dense thick growth of bushes and shrubbery and undergrowth right on the southeast corner, which obstructed the view of anybody here (indicating) looking south, and which we claim obstructed the view of the defendant looking north. Defendant's counsel stated:

"The charge of negligence in this decision is -- or consisted, rather, that we ran and operated this train at a high, negligent, dangerous rate of speed. That is one charge. The second charge is that we didn't blow a whistle when approaching the crossing. It would appear, therefore, that the jury was informed of the acts of negligence charged, and that the case was tried upon the issues presented. In the case of

Blackman v. Will Co., 228 Ill. 62, 12-1-02.

"It has never been considered reversible error to refuse the jury to the decision unless they are required to determine a question of law as to what are the material allegations. (Blackman v. Will Co., 228 Ill. 62.)"

In Bellevue v. Northern Coal Co., 245 Ill. 62, where plaintiff in error

complained of an instruction given by the court to the effect that defendant in error could recover if the case was proved as alleged in the declaration, the court said: "While the practice of giving such an instruction is not to be commended, it is not reversible error where every count in the declaration contains the necessary allegations for recovery." In the instant case defendant's counsel clearly indicated to the jury the charges that were made as to the operation of the train at a dangerous rate of speed and failure to blow a whistle. Although we do not altogether agree with the form of the instruction, we are of the opinion that defendant is in no position to object, having waived its right to do so by making a statement to the jury advising them of the allegations of negligence charged.

There is also some complaint made as to improper conduct of plaintiff's counsel, but we have carefully considered the matters complained of and are of opinion that there is nothing here which would justify a new trial. There was no request that a jury be

withdrawn, but the outcome of the cause was submitted to the jury, and under the circumstances the defendant is not in a position to complain. A party having speculated as to the outcome of the cause and having submitted the cause to the jury, is not later in a position to complain. (G. & E. H. Co. v. Mesch, 163 Ill. 306; Wattaw v. Retail Hdw. Mut. Fire Ins. Co., 287 Ill. App. 284.)

As to the verdict being excessive, this was a wrongful death case wherein the verdict was for \$5,000. The mother of decedent testified that decedent was a normal, healthy, alert child of 11 years who ran errands, participated in household activities and did all she could to help in them. Verdicts for the full statutory maximum of \$10,000 have been upheld in cases involving the wrongful death of minors (Petrovic v. City of Chicago, 251 Ill. App. 542, and Deming v. City of Chicago, 321 Ill. 341), and we are of the opinion that this point should not be urged as a ground for new trial.

After careful consideration of the questions called to our attention, we are of the opinion that the trial court was in error and abused its discretion in sustaining the motion for new trial. In passing upon the questions called to our attention, and, having reached the conclusion that the court erred in granting a new trial, the question then arises as to whether this court should enter judgment on the verdict here or remand the cause to the trial court with directions to enter judgment on the verdict. Upon this question, this court in the case of Mastin v. National Tea Company, 278 Ill. App. 60, said in its opinion;

"Upon an examination of par. 220, sec. 92, ch. 110, of the Civil Practice Act, Cahill's Ill. Rev. St. 1933, providing for the granting of powers to a reviewing court, under subsection (f) it is provided; 'Give any judgment and make any order which ought to have been given or made, and make such other and further orders and grant such relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the issuance of execution, as the case may require', which provision gives this court the power to enter the judgment that should have been entered by the trial court.

without, but the outcome of the cause was submitted to the jury, and under the circumstances the defendant is not in a position to complain. A party having speculated as to the outcome of the cause and having submitted the cause to the jury, is not later in a position to complain. (C. & E. v. State, 183 Ill. 308; Watt v. Retail New and Life Ins. Co., 287 Ill. 404, 284.)

As to the verdict being excessive, this was a wrongful death case wherein the verdict was for \$5,000. The mother of deceased testified that deceased was a normal, healthy, alert child of 11 years who ran errands, participated in household activities and did all she could to help in them. Verdicts for the full statutory maximum of \$10,000 have been upheld in cases involving the wrongful death of minors (Petrovic v. City of Chicago, 381 Ill. 440, 442, and Wentz v. City of Chicago, 381 Ill. 341), and we are of the opinion that this point should not be urged as a ground for new trial.

After careful consideration of the questions called to our attention, we are of the opinion that the trial court was in error and abused its discretion in sustaining the motion for new trial. In passing upon the questions called to our attention, and having reached the conclusion that the court erred in granting a new trial, the question then arises as to whether this court should enter judgment on the verdict here or remand the cause to the trial court with directions to enter judgment on the verdict. Upon this question, this court in the case of Watt v. National Tea Company, 278 Ill. 404, 40, said in its opinion:

"Upon an examination of par. 280, sec. 92, ch. 110, of the Civil Practice Act, G.C. 111, sec. 1, 1937, providing for the granting of powers to a reviewing court, under subsection (7) it is provided: 'Give any judgment and make any order which ought to have been given or made, and make such other and further orders and grant such relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a new trial, or the issuance of execution, as the case may require,' which provision gives this court the power to enter the judgment that should have been entered by the trial court.

"For the reasons stated, the order of the court granting a new trial is reversed and set aside and judgment entered on the verdict of the jury in favor of the plaintiff and against the defendants in the sum of \$7,500.00."

Subsequently, on a petition for leave to appeal filed in the Supreme Court by the defendant in that action, the prayer of the petition for leave to appeal was denied.

However, for the reasons stated in the instant case and in accord with the opinion of the Supreme Court in the case entitled Scott v. Prescott Motor Casualty Co., 379 Ill. 155, the cause is reversed and remanded with directions that the trial court set aside the order granting a new trial and for further proceedings in due course. The cause will then proceed in the trial court according to law.

ORDER GRANTING NEW TRIAL REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS THAT THE COURT SET  
ASIDE THE ORDER GRANTING NEW TRIAL AND FOR  
FURTHER PROCEEDINGS IN THE COURSE.

BURKE, P.J. AND XILEY, J. CONCUR.

"For the reasons stated, the order of the court granting a new trial is reversed and set aside and judgment entered on the verdict of the jury in favor of the plaintiff and against the defendant in the sum of \$7,500.00."

Subsequently, on a petition for leave to amend filed in

the Supreme Court by the defendant in that action, the order of

the petition for leave to amend was denied.

However, for the reasons stated in the instant case and

in accord with the opinion of the Supreme Court in the case entitled

Scott v. Northwest Motor Assembly Co., 370 Ill. 185, the case is

reversed and remanded with directions that the trial court set aside

the order granting a new trial and for further proceedings in due

course. The cause will then proceed in the trial court according to

law.

ORDER GRANTING RE-ENTRY TO THE COURT AND  
REMANDING THE CAUSE TO THE TRIAL COURT  
WITH THE ORDER GRANTING A NEW TRIAL AND FOR  
FURTHER PROCEEDINGS IN THE COURT.

MURRAY, P. J. AND KILPATRICK, J. CONCUR.



41917

WALLACE J. GOODRICH, administrator of  
the Estate of Frances Goodrich, Deceased,

APPEAL FROM

Appellant,

v.

CIRCUIT COURT

A. A. SPRAGUE, Receiver for the Chicago,  
North Shore & Milwaukee Railroad Company,  
a corporation,

COOK COUNTY.

Appellee.

314 I.A. 671

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The petitioner, Wallace J. Goodrich, administrator of the estate of Frances Goodrich, deceased, plaintiff below, by his Amended and Supplemental Petition for Leave to Appeal (which was allowed and to which defendant - appellee filed an Answer) prays this court to grant leave to appeal from the order of the Circuit Court of Cook County entered June 20, 1941, granting a new trial in this cause. Petitioner represents that on July 23, 1937, plaintiff's decedent was killed by a train operated by defendant; that on January 7, 1938, petitioner filed his complaint in the Circuit Court of Cook County against defendant - appellee; that the case came on for jury trial and on March 7, 1939, the jury returned a verdict finding the defendant guilty and assessing plaintiff's damages at \$5,000.00. The defendant thereafter filed a motion for judgment notwithstanding the verdict, or for a new trial, and on June 23, 1939, the trial judge entered judgment for defendant notwithstanding the verdict, but did not rule upon the motion for new trial.

Upon a former appeal to this court, the defendant presented certain grounds for new trial. This court held, pursuant to section 68 (3)c of the Civil Practice Act, that no error appeared in the grounds urged for new trial which would entitle the defendant to a new trial, and in accordance with this holding entered judgment upon the jury's verdict. (Goodrich v. Sprague, 304 Ill. App. 556).

... ..

1992

1. 1990年1月1日起，凡在北京市区范围内从事经营活动的个体工商户，其经营场所必须取得《北京市个体工商户经营场所证明》。

791

THE WORLD'S LARGEST

• *State of Tennessee, Department of Finance*

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County of Cook County, Illinois, 1907.

100-443887-100

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of the investigation into the alleged involvement of British intelligence services in the activities of the IRA.

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Approximate Number of Fish Caught in Each Season

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U.S. DEPARTMENT OF COMMERCE, BUREAU OF ECONOMIC ANALYSIS, WASHINGTON, D.C. 20540

Section der Jugend der Nationalsozialistischen Bewegung

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CONFIDENTIAL

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Section 65 (2) of the Civil Aviation Act, 1949.

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When the jury's verdict.

The defendant thereafter sued out a writ of error in the Supreme Court of Illinois, contending inter alia, that section 68 (3)c was unconstitutional in so far as it authorized the Appellate Court to pass upon grounds for new trial which had not been ruled upon by the trial court. The Supreme Court held that such action was not within the appellate jurisdiction of the Appellate Court and that the case must be remanded to the trial court to pass upon the motion for new trial. The Supreme Court affirmed the decision of the Appellate Court in reversing the judgment notwithstanding the verdict and held that the case was properly submitted to the jury. (Goodrich v. Sprague, 378 Ill. 80).

Upon reinstatement and redocketing in the Circuit Court, the motion for new trial was considered on June 20, 1941 by the trial Judge, who granted the motion for new trial. Although the trial Judge stated the reasons for his decision in an oral opinion, he refused to approve the court reporter's transcript of his opinion, on the ground that it was not sufficiently meritorious for presentation to this court.

From the facts and testimony concerning this accident, it appears that the deceased was killed by a train operated by the defendant in the Village of Glencoe where Woodlawn Avenue crosses at grade the tracks of both the North Shore electric Railroad and the Chicago and Northwestern steam railroad. Both sets of tracks at this point are parallel and run nearly north and south; Woodlawn Avenue runs nearly east and west, intersecting the railroad tracks at an angle. The double tracks of the two railroads run parallel to each other from Harbor Street, which is about 1228 feet north of Woodlawn Avenue, to a point 878 feet south of Woodlawn Avenue, where the Northwestern tracks continue south, and the North Shore tracks curve to the east. At the Woodlawn Avenue crossing the distance between the two sets of tracks is 53 feet. The tracks of the Northwestern lie to the west and are on a higher elevation

The defendant thereafter filed a motion for summary judgment in the County of Alameda, California Superior Court, and a hearing was held thereon. The court found in favor of the defendant and entered judgment accordingly. The defendant then filed a motion for a new trial, which was denied. The defendant then filed a motion for a writ of habeas corpus, which was also denied. The defendant then filed a motion for a writ of certiorari, which was granted. The court then set aside its judgment and entered judgment in favor of the plaintiff. The defendant then filed a motion for a new trial, which was denied. The defendant then filed a motion for a writ of habeas corpus, which was also denied. The defendant then filed a motion for a writ of certiorari, which was granted. The court then set aside its judgment and entered judgment in favor of the plaintiff.

On November 1, 1911, the defendant filed a motion for summary judgment in the County of Alameda, California Superior Court, and a hearing was held thereon. The court found in favor of the defendant and entered judgment accordingly. The defendant then filed a motion for a new trial, which was denied. The defendant then filed a motion for a writ of habeas corpus, which was also denied. The defendant then filed a motion for a writ of certiorari, which was granted. The court then set aside its judgment and entered judgment in favor of the plaintiff. The defendant then filed a motion for a new trial, which was denied. The defendant then filed a motion for a writ of habeas corpus, which was also denied. The defendant then filed a motion for a writ of certiorari, which was granted. The court then set aside its judgment and entered judgment in favor of the plaintiff.

From the facts and circumstances hereinbefore stated, it appears that the defendant was entitled to a new trial. The defendant in the County of Alameda, California Superior Court, and a hearing was held thereon. The court found in favor of the defendant and entered judgment accordingly. The defendant then filed a motion for a new trial, which was denied. The defendant then filed a motion for a writ of habeas corpus, which was also denied. The defendant then filed a motion for a writ of certiorari, which was granted. The court then set aside its judgment and entered judgment in favor of the plaintiff. The defendant then filed a motion for a new trial, which was denied. The defendant then filed a motion for a writ of habeas corpus, which was also denied. The defendant then filed a motion for a writ of certiorari, which was granted. The court then set aside its judgment and entered judgment in favor of the plaintiff.

than the North Shore tracks, the difference in elevation being 3 feet 6½ inches. On the north side of Woodlawn Avenue are the North Shore passenger station platforms, which station the local North Shore trains use, but which is not used by the express and special trains. The station for Northwestern steam trains is at Hubbard Woods, south of Woodlawn Avenue.

The neighborhood east of the tracks is residential, with about four dwellings to the acre and one or two parks. One of these parks extends south from Woodlawn Avenue adjacent to the North Shore right of way, and is used as a playground for children. The right of way owned by the North Shore from Woodlawn Avenue to the south extends 52 feet east of the east rail. There are poles, brush, shrubbery and trees on this right of way extending all the way from Woodlawn Avenue to Scott Avenue, the line of poles being about seven feet east of the east rail and the line of trees about 10 or 12 feet further east, ranging from 17 to 20 feet east of the North Shore tracks. There is some conflict in the evidence as to how close the shrubbery and brush was to the east rail. Plaintiff's picture, Exhibit 3 taken on the day of the accident and the testimony of plaintiff's witnesses' evidence that there was a heavy growth of shrubbery extending fully as far west as the line of poles, and also some bushes between the poles and the tracks. For the defendant, the motorman, Schmidt, testified that the brush and shrubbery were about twenty feet from the rail. Defendant's exhibits show less brush and shrubbery than plaintiff's evidence indicated, but these pictures were taken on July 28, 1937, five days after the event and two witnesses testified that these photographs did not correctly portray the crossing as it was on July 23, 1937 because brush and shrubbery had been removed a few days after the event.

than the North Shore tracks, the difference is that the North Shore tracks are on the north side of the North Shore passenger station platform, which is the North Shore train use, but which is not used as a passenger station. The station for North Shore passenger trains is at Hubbard Woods, south of Hubbard Woods.

The neighborhood east of the tracks is residential, with about four dwellings to the acre and one or two houses. One of these parks extends south from Hubbard Woods Avenue to the North Shore right of way, and is used as a playground for children. The right of way owned by the North Shore from Hubbard Woods to the south extends 32 feet east of the right of way. From the right of way from Hubbard Woods to West Avenue, the line of trees being about seven feet east of the right of way and the line of trees about 10 or 12 feet further east, running from 15 to 25 feet east of the North Shore tracks. There is some conflict in the evidence as to how close the shrubbery and brush are to the right of way. Plaintiff's picture, Exhibit 3 taken on the day of the accident and the testimony of Plaintiff's witnesses' evidence that there was a heavy growth of shrubbery extending fully as far east as the line of poles, and also some bushes between the poles and the tracks. For the defendant, the witness, Exhibit 4 testified that the brush and shrubbery were about twenty feet from the right of way. Exhibits show how close and shrubbery from Plaintiff's evidence indicated, but these pictures were taken on July 20, 1937, five days after the event and two witnesses testified that these photographs did not correctly portray the condition as it was on July 11, 1937 because brush and shrubbery had been removed a few days after the event.

There are no gates at the crossing. The warning system consists of four signal posts. All four have flashing red lights and two have bells in addition. For convenience, these posts are herein designated respectively, A, B, C, and D. Signal post A is located on the north side of Woodlawn Avenue, just east of the North Shore tracks, and is equipped with both a bell and a flasher. Signal post B is on the south side of Woodlawn Avenue, between the tracks of the two railroads, but closer to the North Shore tracks. It has a flasher but no bell. Signal post C is on the north side of Woodlawn Avenue, between the two sets of tracks, but closer to the Northwestern tracks, and likewise has a flasher but no bell. Signal post D is located on the south side of Woodlawn Avenue, west of the Northwestern tracks, and like post A has both bell and flasher. Thus, the two outside posts have both bells and flashers, while the two inside posts have flashers only. These signals operate as follows. When trains are approaching the crossing on both lines, all four signals operate. If only a North Shore train is approaching, then only signal posts A, B and D operate; signal post C does not operate. If only a Northwestern train is approaching, then signals A, C and D operate and signal post B does not. That is, signal post A and D (the ones with the bells) operate whenever a train is approaching the crossing on either railroad; signal post B is actuated only by North Shore trains.

These signals are operated automatically, by means of electricity. When a train crosses a certain point in the rail, known as a cut-in point, the signals begin to function. The cut-in point for Northbound trains on the North Shore tracks is located 1160 feet south of the Woodlawn Avenue crossing; this point is south of the curve in the North Shore tracks. The cut-in point for northbound trains on the Northwestern tracks is 3072 feet south of the crossing, which is south of the Hubbard Woods station.

There are no other signals on the line. The signal is  
seen late of train signal. All other signals are  
and two have bells in addition. For convenience, these signals are  
herein designated respectively, A, B, C, and D. Signal A is  
located on the north side of Woodlawn Avenue. Just east of the north  
shore tracks, and is enclosed with a bell and a flasher. Signal  
B is on the south side of Woodlawn Avenue, between the two tracks  
of the two railways, but closer to the north shore tracks. It  
has a flasher but no bell. Signal C is on the north side of  
Woodlawn Avenue, between the two sets of tracks, but closer to the  
Northwestern tracks, and likewise has a flasher but no bell. Signal  
D is located on the south side of Woodlawn Avenue, west of the  
Northwestern tracks, and like the other signals has a flasher.  
Thus, the two outside posts have both bells and flashers, while the  
two inside posts have flashers only. These signals operate as  
follows. When trains are approaching the crossing on both lines,  
all four signals operate. If only a north bound train is approaching,  
then only signal posts A, B and C operate; signal post D does not  
operate. If only a Northwestern train is approaching, then signals  
A, C and D operate and signal post B does not. If only a south  
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for Northbound trains on the North Shore tracks is located 1150 feet  
south of the Woodlawn Avenue crossing; this point is south of the  
curve in the North Shore tracks. The cut-in point for southbound  
trains on the Northwestern tracks is 500 feet south of the crossing,  
which is south of the Hubert code station.



This accident happened on July 23, 1937, at about 6:00 P.M. daylight saving time. It was a clear day; the sun was out but beginning to set. Decedent approached the crossing from the east, on the south sidewalk. She was going slowly, and gradually slowed down her bicycle until she came to a stop with one foot on the pedal of her bicycle and the other on the ground. The front wheel of her bicycle was either just touching the rail or just short of it. The bells at the crossing were ringing as she approached prior to the impact, due in part at least to the presence of a Northwestern steam train, headed north standing at the Hubbard Woods station. Just before the train hit decedent she made an unsuccessful attempt to move back, but it was too late.

There is a conflict in the evidence as to how long decedent was at the track before she was hit; whether or not the train whistle was blown; how fast the train was going; and how far the train traveled after the brakes were applied. Witnesses Sullivan and Mrs. Turner, eye witnesses to the occurrence, testified that decedent was in a stationary position for fifteen to thirty seconds before she was hit. Curby, another eye witness, corroborated this; he further testified that he saw the girl waiting there, and after the train rounded the curve at Scott Avenue he arose from his seat, moved to the edge of the platform and waved his hand up and down four or five times as a signal to the motorman to blow his whistle. The motorman, Schmidt, testified that he did not see decedent until he was about 150 feet from the crossing at which time she emerged from behind a tree; she kept coming and stopped near the rail and was only there a very few seconds before he hit her. The witness Sullivan testified that no whistle was blown until just about the moment of impact and Curby said he heard no whistle at all before the crash. Motorman, Schmidt, testified that he blew four or five short blasts on the whistle as soon as he saw decedent at which time he was 150 feet from the crossing. The testimony of other



members of the train crew (who were on duty in the coaches) tended to corroborate Schmidt's testimony as to the distance of the train from the crossing when the whistle was blown, but they heard only one blast of the whistle.

There was evidence that the speed of the train was about 40 to 45 miles per hour, and witness, Tanney, testified that it was possible that the train was going 45 or 50 miles an hour but that he doubted it. There is a conflict in the evidence as to how far the train traveled after the accident. Witness Sullivan testified that there were five cars in the train and that it ran  $2\frac{1}{2}$  to 3 times its length after the accident. Curby agreed that it was a four or five car train. The length of a car is about 60 feet. The members of the train crew testified that the train was composed of three cars and that it traveled about 500 feet from the point where the brakes were applied to the point where the train came to a stop.

Mrs. Goodrich, mother of decedent, and a school teacher, both testified regarding decedent's age, experience, intelligence and capacity. At her death, she was 11 years and 3 months old, and was about four feet eleven inches tall; her hearing and sight were normal; she was a good student, alert and interested in everything, and was a little above the average in intelligence and capacity; she took part in plays, singing, swimming, art and dancing. She had been riding a bicycle since she was seven years of age, but it had been only a few months since she had gone any distance from her home, which was in Winnetka, about one block west of the tracks. Decedent had some friends who lived east of the tracks some blocks to the south of Woodlawn Avenue, and visited them occasionally, but most of the time she was taken there by her mother or by the mothers of her friends. She had been allowed to cross the tracks by herself for only a year. Mrs. Goodrich testified that to her knowledge the only crossing her daughter had crossed on a bicycle was 11 Dorado Avenue in Winnetka, which crosses the tracks of both railroads, and that

members of the train crew (who were on duty in the coaches) tended to corroborate Schmidt's testimony as to the location of the train from the crossing when the whistle was blown, but they heard only one blast of the whistle.

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both testified regarding decedent's age, experience, intelligence and capacity. At her death, she was 11 years and 3 months old, and was about four feet eleven inches tall; her hearing and sight were normal; she was a good student, alert and interested in everything, and was a little above the average in intelligence and capacity; she took part in plays, singing, swimming, art and dancing. She had been riding a bicycle since she was seven years of age, but it had been only a few months since she had gone any distance from her home, which was in Winnetka, about one block west of the tracks. Decedent had some friends who lived east of the tracks some blocks to the south of Woodlawn Avenue, and visited them occasionally, but most of the time she was taken there by her mother or by the mother of her friends. She had been allowed to cross the tracks by herself for only a year. Mrs. Goodrich testified that to her knowledge the only crossing her daughter had crossed on a bicycle was 11 North Avenue in Winnetka, which crosses the tracks of both railroads, and that

the El Dorado Avenue crossing is protected by gates.

The motion for new trial alleges in general terms that the trial court erred in excluding proper evidence offered by defendant and in admitting improper evidence offered by plaintiff.

The Supreme court, in passing upon the questions involved in the case of Goodrich v. Sprague, 376 Ill. 80, said;

"Viewed in the light of the rule that if evidence supporting plaintiff's claim appears in the record the cause should be submitted to a jury, we are of the opinion that such evidence exists in this record, and unless it can be said that deceased was guilty of contributory negligence, as a matter of law, which we do not think can be said on this record, the issues of negligence and contributory negligence are questions that were properly submitted to the jury."

Further, the court there said in its opinion;

"Photographs were introduced in evidence showing the condition of the right of way of the 'North-Shore' electric lines. There is evidence in the record that trees and shrubs grew to within 10 or 15 feet of the east side of the east track, immediately south of Woodlawn Avenue. Its right-of-way there extended 50 feet east of the east track. The statute required that it clear its right-of-way of trees and shrubs for a distance of 500 feet on either side of a crossing. This means all the width of its right-of-way. That was not done in this case."

Upon this question defendant's counsel made the statement that "the east right-of-way line of the Chicago North Shore & Milwaukee Railroad Company, south of Woodlawn Avenue is 52 feet east of the east rail of the north bound tracks. This plat shows a line of trees 20 feet east of the east rail of the north bound tracks of the Chicago, North Shore & Milwaukee Railroad Company, as shown on this plat." It clearly appears that brush, shrubbery and trees grew on defendant's right-of-way south of Woodlawn Avenue. Mr. Young, Village Manager of Glencoe, testified that a line of poles stretched along the right-of-way at about 7 feet from the east rail of the North Shore tracks and that the line of trees was 10 or 12 feet farther east than the poles. These trees were poplars or cottonwoods with low hanging branches, and the underbrush extended as far west at the line of trees, if not a little farther. Other witnesses testified that the bushes and shrubbery extended right up to the telephone poles, and that there were bushes between the poles and the tracks.

The El Dorado Avenue crossing is protected by gates.  
The motion for new trial alleges in general terms that the  
trial court erred in excluding proper evidence offered by defendant  
and in admitting improper evidence offered by plaintiff.  
The supreme court, in passing upon the questions involved  
in the case of Woodruff v. Milwaukee, 176 Ill. 56, said:

"Viewed in the light of the rule that if evidence supports  
the plaintiff's claim appears in the record the case should be  
submitted to a jury, we are of the opinion that such evidence  
exists in this record, and unless it can be said that the defendant  
guilty of contributory negligence, as a matter of fact, which we  
do not think can be said on this record, the issue of negligence  
and contributory negligence are questions that were properly  
submitted to the jury."

Further, the court there said in its opinion:

"Photographs were introduced in evidence showing the  
condition of the right-of-way of the 'North Shore' electric line.  
There is evidence in the record that trees and shrubs grow to  
within 10 or 12 feet of the east side of the east track, immediately  
south of Woodruff Avenue. The right-of-way there extended 50 feet  
east of the east track. The statute provided that it clear its  
right-of-way of trees and shrubs for a distance of 500 feet on  
either side of a crossing. This means all the width of its right-  
of-way. That was not done in this case."

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east right-of-way line of the Chicago North Shore & Milwaukee Railroad  
Company, south of Woodruff Avenue is 50 feet east of the east rail.  
of the north bound track. This plat shows a line of trees 50 feet  
east of the east rail of the north bound track of the Chicago  
North Shore & Milwaukee Railroad Company, as shown on this plat."  
It clearly appears that brush, shrubbery and trees grow on defendant's  
right-of-way south of Woodruff Avenue. Mr. Young, witness for  
of witness, testified that a line of poles stretched along the right-  
of-way at about 7 feet from the east rail of the North Shore branch  
and that the line of trees was 10 or 12 feet farther east than the  
poles. These trees were coplars or cottonwoods with low hanging  
branches, and the underbrush extended as far west as the line of  
trees, if not a little farther. Other witnesses testified that the  
brushes and shrubbery extended right up to the telephone poles, and  
that there were bushes between the poles and the tracks.

The purpose of the statute requiring that rights-of-way be cleared near crossings seems clearly to have been to (1) enable the motorman to see people at or near the tracks, and (2) afford to people approaching the crossing an unobstructed view of the tracks and crossing. The Supreme Court, in Goodrich v. Sprague, (supra), further said;

"There is evidence that one approaching the crossing from the east on the south side of Woodlawn Avenue, as did the deceased, would have to come within a comparatively few feet of the northbound track before having a clear view for any considerable distance down the track."

There is also the testimony given by the motorman that he "didn't see her until she came out from behind a tree there. That tree stands about fifteen or twenty feet from the east rail of the northbound track. I first saw her when she came from behind that tree. The moment I saw her I jumped up and took my hand off the power and threw the train in emergency . . . . I could have done nothing else to stop the train . . . A large tree prevented me from seeing the little girl before the time when she was 15 feet from the rail . . . I saw her just as she emerged from behind that tree. What prevented me from seeing her before she got to that tree were the trees further back which obstructed the view. There are trees all along there obstructing the view." There were other witnesses who testified that decedent was in a stationary position, with her bicycle wheel very close to the east rail, for a period of fifteen to thirty seconds. It appears also that the space of 53 feet between the two railroads gives ample space to stand in safety. The local passenger station for south bound trains is located in that space, and, since people can wait in safety between the two railroads, there is an inducement to pedestrian or cyclist to regard each set of tracks as separate crossings, and it was natural for decedent to approach the track to see if a train was coming on the North Shore track. There is evidence that the signals were operating about the time when decedent approached the track. There was a Northwestern train standing at Hubbard Woods

the witness of the witness...  
 cleared her...  
 policeman to see...  
 people as...  
 and crossing...  
 further said;  
 "There is evidence...  
 the fact on the south side of...  
 would have to come...  
 track before...  
 the track."  
 There is also the...  
 see her until...  
 stands about...  
 bound track. I...  
 the moment I...  
 and threw the...  
 else to stop...  
 the little girl...  
 I saw her...  
 me from seeing...  
 back which...  
 obstructing the...  
 that descent...  
 very close to...  
 It appears also...  
 gives ample...  
 for south bound...  
 can wait in...  
 to pedestrian...  
 crossings, and...  
 see it a train...  
 that the signals...  
 the track. There



station, which caused the bells to ring, and which had been standing there for at least five minutes before decedent stopped at the crossing. Signal post B, which was in decedent's direct line of vision, did not start to flash until after she came to a stop. It appears from the evidence that decedent looked south toward the Northwestern train standing at the Hubbard Woods station, which logically enough was the reason for the ringing bells, and strengthened the conclusion reached from the non-operation of signal post B that no North Shore train was approaching. When the signal on post B finally did begin to flash, it escaped decedent's attention for the change it created in the surroundings was slight and hardly noticeable in view of the Northwestern train and the continuous ringing of the bells. It would appear, as suggested, that because of defendant's violation of the statute it was impossible for decedent to look south down the North Shore tracks due to the curve of the tracks without placing herself in a position of danger. There was a heavy growth of shrubbery extending as far west as the line of telephone poles and there were some bushes between the poles and the track. The line of telephone poles was only 7 feet from the east rail, and, due to the overhang of the car from the rail and the distance from the seat of the bicycle to the front wheel, six feet from the tracks was the minimum point of safety for decedent. There were no gates or barriers. The sidewalk crosses the tracks at grade, with smooth boards flush with the rails; a child would not be able to see where the tracks were, without putting herself within the danger zone. It appears from the facts detailed that defendant violated the statute and that decedent's view was obscured in such manner as could have caused her unwittingly to place herself in a position of danger in order to determine whether a train was coming.

Defendant contends, however, that since there were signals decedent was bound to heed them, and that if she did not do so, her death was not the proximate result of the violation of the statute.

station, which is used as a main station, and which is a main station, there for at least five minutes before defendant was at the station. Signal post 2, which was in defendant's line of vision, did not start to flash until after the car was 100 feet from the station. The evidence that defendant looked toward the station as the train standing at the end of the station, which is a main station, was the reason for the station police, and strengthened his conclusion reached from the non-operation of signal post 2 that no train was approaching. When the signal on post 2 finally did flash to flash, it escaped defendant's attention for the reason it occurred in the surroundings was light and flashing lights in view of the Northwestern train and the continuous ringing of the bell. It seems correct, as suggested, that because of defendant's line of vision it was impossible for defendant to look up from the North Shore tracks due to the curve of the tracks which is about 100 feet in a position of danger. There was a heavy weight of evidence extending as far west as the line of telephone poles and there were some bushes between the poles and the track. The line of telephone poles was only 7 feet from the east rail, and due to the overhang of the car from the rail and the distance from the seat of the bicycle to the front wheel, six feet from the track, was the minimum point of safety for defendant. There were no other witnesses. The sidewalk crosses the tracks at grade, with wooden boards flush with the rails; a child would not be able to see above the track bars without looking directly within the danger zone. It seems from the facts detailed that defendant violated the statute and that defendant's view was obscured in such manner as could have caused an accident to place herself in a position of danger in order to telephone station a train was coming. Defendant contends, however, that since there were signal posts defendant was bound to heed them, and that if she did not see her death was not the proximate result of the violation of the statute.

In this regard, even though the crossing was so laid out and the signal system so constructed that it was reasonably to be expected that decedent would approach the crossing to see if a train were coming, still, the legislative purpose in enacting the brush statute was to insure to the public, using that crossing, the benefit of a clear view, in addition to any other warning devices which the railroad might erect. That defendant violated the statute is sustained by the facts in evidence, as well as being the fixed law in this case by the decision of the Supreme Court. (Goodrich v. Saragusa, supra.)

There is ample evidence in the record from disinterested witnesses from which the jury could find that decedent and her bicycle were in a stationary position, near the east rail, for a period of 15 to 30 seconds before she was struck. It is contended that the failure of the motorman to see decedent standing at the crossing, or his neglect to warn her of her danger, if he did see her, was negligent. It does appear that the weight of the evidence supports plaintiff's position. There is a question as to when the motorman saw decedent. If he saw her as soon as he rounded the curve at Scott Avenue, he was negligent in not blowing his whistle in time to warn her. There is also some conflict as to when the whistle was actually blown. All of defendant's witnesses, it seems, conceded that no whistle was blown until the train was 150 feet from the crossing. Indeed, all the evidence shows negligent failure to blow the whistle in time to avoid the accident. If the motorman did not see decedent until he was almost upon her, it was because his view of the crossing was obstructed by the trees and shrubbery. These facts were before the jury and it was for the jury to say whether the motorman properly signaled. The fact is that the motorman failed to blow his whistle while decedent was stationary at the crossing for 15 to 30 seconds, and can be accounted for in three ways; first, he wasn't looking; second, he saw her, but still failed to warn her; third, he was prevented from seeing her by the trees and

There is ample evidence in the record from disinterested witnesses from which the jury could find that Decedent and her bicycle were in a stationary position, near the east rail, for a period of 15 to 20 seconds before the accident. It is undisputed that the failure of the defendant to see Decedent standing at the crossing, or his neglect to warn her of her danger, at no time was her, was negligent. It does appear that the witness at the witness stand, Plaintiff's position. There is a question as to when the defendant saw Decedent. If he saw her as soon as he rounded the curve at 100 feet, he was negligent in not blowing his whistle in time to warn her. There is also some conflict as to when the whistle was actually blown. All of defendant's witnesses, it seems, conceded that no whistle was blown until the train was 100 feet from the crossing. Indeed, all the evidence seems negligent in time to blow the whistle in time to avoid the accident. If the defendant did not see Decedent until he was almost upon her, it was because his view of the crossing was obstructed by the trees and shrubbery. Those facts were before the jury and it was for the jury to say whether the defendant properly signaled. The fact is that the defendant failed to blow his whistle while Decedent was stationary at the crossing for 15 to 20 seconds, and can be accounted for in three ways: first, he wasn't looking; second, he saw her, but still failed to warn her; third, he was prevented from seeing her by the trees and shrubbery.

shrubbery which were admittedly on the right of way in violation of statute. It would appear from the facts that the greater weight of the evidence indicates that there was negligence in not giving the required warning.

The next thing we have to consider is the speed of the train at the time. The rate of speed at which a train may be operated depends on the peculiar facts of each individual case, and, whether or not a given rate of speed is negligent, is a question of fact for the jury, unless the court is of the opinion that as a matter of law, under the facts of the particular case, no reasonable jury could find the speed unreasonable. (Landon v. Chicago & G.T. Ry. 92 Ill. App. 216; Cleveland v. Cleveland, C. C. & St. L. Ry., 169 Ill. App. 157; Brundage v. Chicago, B. & Q. R. R., 245 Ill. App. 440.) It appears from the evidence that all witnesses who testified estimated the speed of the train to have been at least 40 miles per hour. Several witnesses, including defendant's trainmen, estimated the speed at 40 to 45 miles. While this speed may be safe at some crossings, the jury might properly have found that such speed was not reasonable in this case where children customarily played in a park adjacent to the right of way, where the view was obstructed, the warning signals confusing, and where no warning was given by blowing a whistle. Considering these facts, which are of course matters for the jury, and which, no doubt, were considered by it in reaching the verdict of guilty and assessing plaintiff's damages in the sum of Five thousand dollars, we find no reason for disturbing the jury's verdict.

Likewise, the question whether a child of eleven years of age is guilty of contributory negligence is a question for the jury. The decisions in this state lay down the rule that whether a child between the ages of 7 and 14 is guilty of contributory negligence in a particular case, is an open question of fact and must be left to the jury. The jury's verdict on this question should stand. Aside from the foregoing rule, it is contended that there was ample evidence



in the record to show that decedent exercised that degree of care which a child of her age, capacity, intelligence and experience would have exercised under the same or similar circumstances, and it is urged by plaintiff that on the evidence, it was for the jury alone to decide whether decedent was guilty of contributory negligence, citing Chicago & Alton R. R. v. Pearson, 184 Ill. 586, and Idin, J. & L. Ry. v. Lawlor, 229 Ill. 621, and other cases.

The real question which we ought to consider in this matter is whether a new trial may be granted where the questions have been submitted to the jury to determine the weight of the evidence and credibility of the witnesses. As suggested in Neople v. Manisch, 361 Ill. 465, the jury's verdict may not be lightly set aside. The court there said;

"Whatever may be the rule in certain other jurisdictions, we firmly adhere to our often-asserted belief that it is the province of the jury, alone, to determine the weight of the evidence and the credibility of the witnesses. If it were not so there would be little use for the jury system. The jury, as a fact-finding body, is of such importance that an abridgement of its functions in this regard and an appropriation of them by the judges would mean the forsaking of a valued tradition in our system of jurisprudence. The utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury."

See also Russell v. Richardson, 302 Ill. App. 589.

The defendant, however, cites Gavin v. Keter, 276 Ill. App. 306, on the question of whether or not there was an abuse of discretion on the part of the trial court in granting a new trial, where the court said;

"In passing upon the merits of the instant contention it must be borne in mind that this is an appeal from an order of the trial court granting a new trial. If judgment had been entered upon the verdict and the appellees were here claiming that the evidence did not warrant the verdict, the question of the preponderance of the evidence would not arise in this court and we would not be warranted in disturbing the verdict of the jury unless the verdict was clearly against the manifest weight of the evidence. But, under the new Practice Act . . . this appeal concerns the action of the trial court in granting a new trial. A trial court has more latitude than this court in passing upon the verdict of the jury. The allowance or refusal of a new trial upon the weight of the evidence is peculiarly within the discretion of the trial court and he is warranted in granting a new trial if a plaintiff has failed to sustain his claim by a preponderance of the evidence. In passing

in the record to show in a precedent accepted that degree of care which a child of her age, capacity, intelligence, and it is have exercised under the same or similar circumstances, and it is urged by plaintiff that on the evidence, it was for the jury to decide whether defendant was guilty of contributory negligence.

Chicago & North Western Ry. v. Larson, 236 Ill. 501, and other cases.

The real question which is to be considered is this: Is whether a new trial may be granted where the question has been submitted to the jury to determine the weight of the evidence and credibility of the witnesses. As suggested in Chicago & North Western Ry. v. Larson, 236 Ill. 501, the jury's verdict may not be lightly set aside. The court there said:

"However may be the rule in cases of other jurisdictions, we firmly adhere to our often-stated belief that it is the province of the jury, alone, to determine the weight of the evidence and the credibility of the witnesses. It is not for the court to set aside the jury's verdict. The jury, as a fact-finding body, is of such importance that an endorsement of its function in this regard and an appropriation of them by the judges would mean the forsaking of a valued tradition in our system of jurisprudence. The usual question should be exercised not only by the trial court but by the reviewing courts to uphold the sanctity of the trial by jury."

See also Chicago & North Western Ry. v. Larson, 236 Ill. 501, 502. The defendant, however, cites Chicago & North Western Ry. v. Larson, 236 Ill. 501.

302, on the question of whether or not there was an abuse of discretion on the part of the trial court in granting a new trial, where the court said:

"In passing upon the merits of the instant controversy it must be borne in mind that this is an appeal from an order of the trial court granting a new trial. If judgment had been entered upon the verdict and the evidence were held to be sufficient to support the verdict, the question of the propriety of the trial court in granting a new trial would not arise in this court and we would not be warranted in disturbing the verdict of the jury unless the verdict was clearly against the manifest weight of the evidence. But, under the new practice act . . . this appeal concerns the right of the trial court in granting a new trial. A trial court may set aside its verdict and grant a new trial upon the weight of the evidence or refusal of a new trial upon the weight of the evidence is peculiarly within the discretion of the trial court and he is warranted in granting a new trial if a plaintiff has failed to sustain his claim by a preponderance of the evidence. In passing



upon the question as to whether or not the trial court in such case was justified in granting a new trial, we must bear in mind that there are many things which a trial judge observes on a trial that do not appear from the printed record, - the appearance of a witness, his or her manner of testifying, and other circumstances that greatly aid the trial court in determining the credibility of a witness and the weight, if any, that should be attached to his or her testimony."

However, in considering this case, the allegations in the complaint of negligent acts on the part of the defendant must be considered, and also as to whether plaintiff has sustained any one or more of them. From the cases called to our attention the rule seems to be that a new trial should not be granted unless the verdict is manifestly against the weight of the evidence. We are of the opinion that the court erred in granting a new trial on the facts and issues here involved, and are of the opinion that plaintiff's case was supported by a preponderance of the evidence. This conclusion we have carefully considered and under the facts and circumstances as detailed by the witnesses and exhibits offered, we conclude that there was such a preponderance of evidence for plaintiff's case which did not justify the trial court in granting a new trial.

Objection was made to the admission and exclusion of certain evidence. A section foreman employed by defendant was produced for the purpose of showing that no brush or shrubbery was cut at the scene of the accident before defendant's photographs were taken. He made certain reports of the work done by himself and his crew; he used these reports to refresh his recollection, and having refreshed his recollection testified in full as to the work done. The reports were then excluded. In regard to writings used to revive recollection, it is said in Wigmore on Evidence, 3rd Ed. Vol. III, sec. 763, p. 112, "That the offering party has not the right to treat it as evidence, by reading it or showing it or handing it to the jury, is well established." In Davis v. Michigan Central R. R. Co., 294 Ill. 355, it was said that; "The entries in the book kept by the car inspector who examined the draw-bars and couplers on the day of the accident were properly excluded from the jury. A witness for plaintiff in

upon the question as to whether or not the trial court in granting a new trial was justified in granting a new trial, we need not be told that there are many things which a trial judge is entitled to do which do not appear from the official record - the evidence of a witness, his or her manner of testifying, and other circumstances in a trial and the trial court in determining the credibility of a witness and the weight, if any, that should be accorded to his or her testimony."

However, in considering this case, the allegations in the

complaint of negligent acts on the part of the defendant were not considered, and also as to whether plaintiff has established any one or more of them. From the cases cited in our brief in the briefs

to be that a new trial should not be granted unless the verdict is manifestly against the weight of the evidence. The rule of law is that the court erred in granting a new trial on the facts and issues here involved, and are of the opinion that plaintiff's case was

supported by a preponderance of the evidence. His conclusion was have carefully considered and under the facts and circumstances as detailed by the witnesses and exhibits offered, we conclude that there was such a preponderance of evidence for plaintiff's case which did not justify the trial court in granting a new trial.

Objection was made to the admission and exclusion of certain evidence. A section foreman employed by defendant as producer for the purpose of showing that no breach of contract was out of the scene of the accident before defendant's photograph was taken. He made certain reports of the work done by himself and his crew. He used these reports to refresh his recollection, and having refreshed his recollection testified in full as to the work done. The reports were then excluded. In regard to writing used to refresh recollection, it is said in *Wigmore on Evidence*, 2nd ed. Vol. 1, sec. 753, p. 312, "That the offering party has not the right to treat it as evidence, by reading it or showing it or handing it to the jury, is well established." In *Reyn v. Michigan Central R. Co.*, 204 Ill. 330, it was said that: "The entries in the book kept by the car inspector who examined the draw-bars and couplers on the day of the accident were properly excluded from the jury. A witness for plaintiff is

error was permitted to testify as to all the facts contained in the entries and was permitted to refresh his memory from the entries made by him in the book kept by him. There is no rule of evidence making such entries admissible where the making of them is in no way brought in issue. They were made after the accident and were self-serving declarations."

There is also a contention made by defendant that there was error in admitting in evidence plaintiff's exhibit 3. This photograph was admitted with the following instruction to the jury;

"Now I would like to comment that in that photograph there is a superimposed - well, that is in the photograph itself, the picture of boy and a bicycle. It appears that the Tribune Reporter from the witness stand stated that a policeman indicated to him the position of the bicycle and the little girl at the time of the accident. Now, the jury is to disregard entirely the position of the bicycle and the boy in the picture, because the position of the bicycle, as told to the Tribune Reporter by the policeman, is not evidence, the policeman not having been an eyewitness to the accident. Therefore, I am letting this photograph go into evidence with the admonition to the jury that they are to disregard entirely the position of the bicycle and also the persons shown in this photograph, and it is admitted merely for the purpose of showing the physical surroundings."

This photograph was the only photograph showing the condition of the brush and shrubbery which was taken the same day as the occurrence, defendant's photographs having been taken five days later and there was evidence by disinterested witnesses that these pictures did not correctly show the condition of the brush and shrubbery at the time of the occurrence because it had been cut down in the intervening period. Defendant's own witness testified that on July 24th (the day after the occurrence) his crew were mowing grass along this stretch. The purpose of evidence being to get at the truth, all evidence and particularly photographic evidence which portrays the condition as it was at the moment of the occurrence, should be admitted unless there is some compelling reason in law or logic for keeping it out. There seems to have been other evidence of witnesses familiar with the right of way, who testified that the photograph correctly portrayed the conditions of the shrubbery at the time of the accident. From

known was admitted to testify to the fact that the  
 evidence and the witness who testified that the witness  
 by in the case sent by him, and the witness who testified  
 such evidence absolutely false, and the witness who testified  
 in issue. They were also given the right to cross-examine  
 the witness.

There is also a contention that the witness who testified  
 error in testimony is evidence of the witness who testified  
 was admitted with the following statement to the jury:

"Now I would like to say to you that I am not a  
 is a superfluous - well, and in the case of the witness  
 picture of my and a picture of the witness who testified  
 from the witness who testified that the witness who testified  
 position of the witness who testified that the witness who testified  
 accident. Now, the jury in the case, the witness who testified  
 the picture and the boy in the picture, the witness who testified  
 picture, as told to the witness who testified that the witness  
 evidence, the witness who testified that the witness who testified  
 Therefore, I am telling this picture to the witness who testified  
 admission to the jury that they are in the case of the witness  
 position of the picture and the witness who testified that the witness  
 and it is admitted merely for the purpose of showing the picture  
 surrounding."

This photograph is the only photograph showing the position of the  
 brush and shanty which was seen by the witness who testified  
 defendant's photograph showing the position of the witness who testified  
 was evidence by the witness who testified that the witness who testified  
 correctly show the position of the witness who testified that the witness  
 of the occurrence because it was taken at the time of the occurrence  
 period. Defendant's own witness testified that the witness who testified  
 after the occurrence) it was taken at the time of the occurrence  
 The purpose of evidence being to show the position of the witness who testified  
 particularly photograph which shows the position of the witness who testified  
 it was at the moment of the occurrence, showing the witness who testified  
 there is some compelling reason in fact for the position of the witness  
 There seems to have been other evidence of the witness who testified  
 the right of way, who testified that the witness who testified that the  
 the conditions of the shanty at the time of the occurrence.

what appears in the record the court did not err in admitting the photograph.

The defendants contend that there are certain errors in giving instructions requested by plaintiff and call attention to the following instruction;

"If you believe upon a preponderance of the evidence that on or about July 13, 1937, Frances Goodrich was struck and killed by a train of the defendant; and if you believe that the death of the said Frances Goodrich was proximately caused by the negligence of the defendant as charged in the complaint, then if you also find that Frances Goodrich was both before and at the time of the accident in the exercise of ordinary care for her own safety, you should find the defendant guilty."

Defendant seriously contends that the giving of similar instructions has been repeatedly held reversible error and cannot be cured by other instructions given by the court. Upon this question it is well to observe the statements made by counsel. Plaintiff's counsel stated to the jury "We claim in this case, and we expect to prove to you, that the accident was caused in a large part, if not entirely, by the fact that there was a dense thick growth of bushes and shrubbery and undergrowth right on the south-east corner, which obstructed the view of anybody here (indicating) looking south, and which we claim obstructed the view of the motorman looking north." Defendant's counsel stated; "The charge of negligence in this declaration is - or complaint, rather, that we ran and operated this train at a high, negligent, dangerous rate of speed. That is one charge. The second charge is that we didn't blow a whistle when approaching the crossing". It would appear, therefore, that the jury was informed of the acts of negligence charged, and that the case was tried upon the issues presented. In the case of Dickson v. Swift Co., 238 Ill. 62, it was said;

"It has never been considered reversible error to refer the jury to the declaration unless they are required to determine a question of law as to what are the material allegations. (Fraternal Army v. Evans, 215 Ill. 629)."

In Belaskis v. Bering Coal Co., 246 Ill. 62, where plaintiff in error complained of an instruction given by the court to the effect that defendant in error could recover if the case was proved as alleged



in the declaration, the court said; "While the practice of giving such an instruction is not to be commended, it is not reversible error where every count in the declaration contains the necessary allegations for recovery." In the instant case defendant's counsel clearly indicated to the jury the charges that were made as to the operation of the train at a dangerous rate of speed and failure to blow a whistle. Although we do not altogether agree with the form of the instruction, we are of the opinion that defendant is in no position to object, having waived its right to do so by making a statement to the jury advising them of the allegations of negligence charged.

There is also some complaint made as to improper conduct of plaintiff's counsel, but we have carefully considered the matters complained of and are of opinion that there is nothing here which would justify a new trial. There was no request that a juror be withdrawn, but the outcome of the cause was submitted to the jury, and under the circumstances the defendant is not in a position to complain. A party having speculated as to the outcome of the cause and having submitted the cause to the jury, is not later in a position to complain. (C. & E. R. R. Co. v. Meech, 163 Ill. 305; Nettaw v. Retail Hdw. Mut. Fire Ins. Co., 287 Ill. App. 284.)

As to the verdict being excessive, this was a wrongful death case wherein the verdict was for \$5,000.00. The mother of decedent testified that decedent was a normal, healthy, alert child of eleven years who ran errands, participated in household activities and did all she could to help in them. Verdicts for the full statutory maximum of \$10,000 have been upheld in cases involving the wrongful death of minors (Petrovic v. City of Chicago, 251 Ill. App. 542, and Deming v. City of Chicago, 321 Ill. 341), and we are of the opinion that this point should not be urged as a ground for new trial.





After careful consideration of the questions called to our attention, we are of the opinion that the trial court was in error in sustaining the motion for new trial. Therefore, the order granting a new trial is reversed and the cause remanded with directions that the trial court enter judgment for the plaintiff on the verdict of the jury with interest at 5% per annum from the date of the verdict.

ORDER GRANTING NEW TRIAL REVERSED AND  
CAUSE REMANDED WITH DIRECTIONS THAT  
THE COURT ENTER JUDGMENT ON THE VERDICT  
WITH INTEREST AT 5% PER ANNUM FROM  
DATE OF VERDICT.

BURKE, P.J. AND KILEY, J. CONCUR.

After careful deliberation of the questions raised in the  
attention, as one of the reasons for the trial being held in  
in examining the action for the trial. Therefore, the court is holding  
a new trial is reversed and the same procedure with the trial and the  
the trial court enter judgment for the plaintiff on the basis of  
the jury with interest at 6 per annum from the date of the verdict.

WITNESSES:  
JAMES M. WILSON, JR.  
JAMES M. WILSON, JR.  
JAMES M. WILSON, JR.  
JAMES M. WILSON, JR.  
JAMES M. WILSON, JR.

WITNESSES: JAMES M. WILSON, JR. JAMES M. WILSON, JR.

41722

GENTRUDE HALL,

Appellee,

v.

ARTHUR O. McNAIR, doing business as  
McNair Liquor Store and SALEROO  
BUILDING CORPORATION, a corporation,

Appellants.

APPEAL FROM

SUPREME COURT

JOHN COUNTY.

3141A. 672

MR. JUSTICE KIRBY DELIVERED THE OPINION OF THE COURT.

This is an action under the Dram Shop Act for injuries to plaintiff's person. The jury found for plaintiff and assessed her damages at \$1,500.00. The court entered judgment on the verdict against both defendants and they have appealed.

The defendants seek a reversal of the judgment on the grounds that the manifest weight of the evidence shows the plaintiff did not exercise due care for her safety; that they were deprived of a fair trial by improper argument of plaintiff's counsel and the giving of a prejudicial instruction; and that the damages are excessive. It is not disputed that the plaintiff was injured or that her assailant's conduct was not justified.

Plaintiff, a mother 31 years old, walked to the McNair Liquor Store at about midnight Saturday, July 16, 1938, after she had drunk a glass of beer with her brother at a tavern. In the store she met a friend James Hill and other friends of his, at whose table she sat and had another drink. In the front part of the store there was a small bar, at which individual purchases were made and at the end of which a partition divided the front from the rear in which were about 18 or 20 tables with four seats at a table. In this part of the store patrons were served and here there was dancing. On the night in question most of the tables were occupied.

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

Figure 1

1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved.

• 188 •

554 16

[illegible]

Shortly after plaintiff entered and while she and Hill were talking in a passageway to the only lavatory in the store, a fight started between plaintiff and another woman patron who, the evidence indicates, was intoxicated. The woman in passing plaintiff stepped on the latter's foot and plaintiff made a sharp remark to her which was returned by a blow from the woman. Plaintiff struck back and shortly thereafter was attacked and stabbed with a knife held in the hand of the other woman. Hill, in an effort to aid plaintiff, commenced throwing tables and chairs and in the ensuing confusion, the assailant and her male companion who appears to have furnished the knife, escaped. Later, plaintiff bleeding from wounds in her chest, thigh and side, was helped into a taxicab and taken to the Provident Hospital, and from there by police to the County Hospital.

Defendants contend that the evidence showed that plaintiff had been arguing with Hill, prompted the dispute with her assailant by a vulgar and profane remark, willingly participated in the affray which followed, was not an innocent party, and should not recover.

The jury heard the conflicting stories of the occurrence and we cannot say that plaintiff by any conduct attributed to her by either side, gave sufficient provocation to her assailant for either the blow or stabbing. The jury found by its verdict that plaintiff was in the exercise of due care for her own safety. We cannot say that the manifest weight of the evidence shows otherwise.

The defendant complains of the conduct of plaintiff's counsel in arguing to the jury. He says that counsel misstated the law and that the court by overruling defendant's objections confirmed the misstatements. The objections are to references made by plaintiff's counsel to the testimony of a court reporter, offered for the purpose of impeaching plaintiff. Plaintiff's counsel argued that fairness would have required the witness to read from his shorthand

Shortly after plaintiff entered and while she and Bill were waiting in a passageway to the only lavatory in the store, a fight started between plaintiff and another woman named Baker who, the evidence indicates, was intoxicated. The woman in passing plaintiff's arms on the latter's foot and plaintiff made a sharp movement to get which was returned by a blow from the woman. Plaintiff struck back and shortly thereafter was attacked and stabbed with a knife held in the hand of the other woman. Bill, in an effort to aid plaintiff, commenced throwing tables and chairs and in the ensuing confusion, the assailant and her male companion who appeared to have furnished the knife, escaped. Later, plaintiff bleeding from wounds in her chest, thigh, and side, was helped into a taxi and taken to the Portland Hospital, and from there by police to the County Hospital.

Defendant contends that the evidence shows that plaintiff had been arguing with Bill, provoked the dispute with her assailant by a vulgar and obscene remark, willfully participated in the attack which followed, was not an innocent party, and should not recover.

The jury heard the conflicting stories of the occurrence and we cannot say that plaintiff by any conduct attributed to her by either side, gave sufficient provocation to her assailant for either the blow or stabbing. The jury found by the verdict that plaintiff was in the exercise of due care for her own safety. We cannot say that the earliest weight of the evidence shows otherwise.

The defendant complains of the conduct of plaintiff's counsel in arguing to the jury. We say that counsel misstated the law and that the court by overruling defendant's objections confirmed the misstatements. The objections are to responses made by plaintiff's counsel to the testimony of a court reporter, offered for the purpose of impeaching plaintiff. Plaintiff's counsel argued that fairness would have required the witness to read from his shorthand

notes what was formerly said by plaintiff. It is evident from a consideration of the entire argument and from questions and answers in the record, upon which the disputed argument is based, that counsel's reference was not intended as a statement of law upon the proper method of impeachment, but to call the attention of the jury to the manner in which the witness answered counsel's questions rather from memory than from his notes. We find the court ruled correctly and that defendants were not prejudiced by this reference. Plaintiff's counsel also in his argument said that the defendant, in fairness, should have submitted to plaintiff for her signature, the transcript of her former testimony before using it as an instrument of impeachment. The impeaching testimony included contradictions in plaintiff's past and present testimony relating to what she drank before the altercation; the age of her assailant and whether she staggered; whether her friend/<sup>Hill</sup> had, just prior to the altercation, danced with another person; and whether she had the name and address of the man who took her to the Provident Hospital. The trial court, after a discussion between counsel and the court on this point during plaintiff's cross-examination of the court reporter, sustained defendant's objections to questions about the absence of plaintiff's signature on the transcript. The court having sustained objections to the questions, should have sustained the objection to the argument based thereon. We cannot see that the argument and the ruling of the court had the grave effect which defendants claim. Plaintiff's counsel was talking of fairness, not law, and the court by its ruling could not have confirmed anything more than counsel's idea of fairness. We have concluded from a consideration of the impeaching testimony, in the light of all the circumstances of the case, that the defendants could not have been seriously prejudiced by this part of the argument, nor the court's ruling on defendant's objection thereto. Cases cited by the defendants on these questions of the

notes that was formerly said by plaintiff. It is evident from a consideration of the entire argument and from questions and answers in the record, upon which the disputed argument is based, that counsel's reference was not intended as a statement of law upon the proper method of impeachment, but to call the attention of the jury to the manner in which the witness presented counsel's position rather from memory than from his notes. It is the jury's duty to the manner in which the witness presented counsel's position, and that defendant's duty was not prejudiced by this reference. Plaintiff's counsel also in his argument said that the defendant, in fairness, should have submitted to plaintiff for his signature, the transcript of his former testimony before using it as an instrument of impeachment. The impeachment testimony included contradictions in plaintiff's past and present testimony relating to what she drank before the altercation; the age of her assailant and whether she staggered; whether her friend had, just prior to the altercation, danced with another person; and whether she had the name and address of the man who took her to the Providence Hospital. The trial court, after a discussion between counsel and the court on this point during plaintiff's cross-examination of the court reporter, sustained defendant's objections to questions about the absence of plaintiff's signature on the transcript. The court having sustained objections to the questions, should have sustained the objection to the argument based thereon. We cannot see that the argument and the ruling of the court had the grave effect which defendant claims. Plaintiff's counsel was talking of fairness, not law, and the court by its ruling could not have admitted anything more than counsel's idea of fairness. We have concluded from a consideration of the impeachment testimony, in the light of all the circumstances of the case, that the defendant could not have been seriously prejudiced by this part of the argument, nor the court's ruling on defendant's objection thereto. Cases cited by the defendant on these questions of the



argument are based upon a misstatement of the law made in argument, consequently, this finding is not inconsistent with those cases.

The defendants presented other points based on the argument of plaintiff's counsel, but since no objections were made thereto at the trial, we shall not consider these points.

The defendants finally contend that the size of the verdict indicates that the jury exceeded the allowable elements of damage in the case and that such excess was probably brought about by an instruction given by the court on behalf of the plaintiff, which set forth section 135 of the Dram Shop Act, under which the action was brought. The instruction included this language of the section: "and for exemplary damages". Defendants argue that the wilful and wanton count in plaintiff's complaint had been withdrawn and, accordingly, no exemplary damages were allowable. We agree. No other instruction was given defining or referring to exemplary damages and an instruction was given which clearly limited the allowable damages to the proper elements. We cannot find that the disputed words in the instruction objected to probably impressed the jury or that any probable impression would survive the other instruction given on the question of damages. In Austin v. Bass, 211 Ill. App. 1, cited by defendants, the jury obviously must have been misled by an erroneous instruction which misstated the basis for exemplary damages. That case and the instant case are not parallel. The verdict confirms our view that the instruction was not prejudicial because we believe the damages as assessed are not excessive. Plaintiff was stabbed in the left chest, side and thigh and she suffered the loss of a great deal of blood before being taken on a stretcher to the County Hospital. Some of her wounds did not need stitching, but five of them required 27 stitches. She was in

argument was based upon a misstatement of the law made in argument.  
consequently, this finding is not inconsistent with those cases.  
The defendant presented other facts based on the evidence  
of plaintiff's counsel, and there is no objection made thereto  
at the trial, we shall not consider those points.  
The defendant finally contends that the state of the evidence  
indicates that the jury exceeded the limits of its authority in  
in the case and that such excess was a gross error brought about by an  
instruction given by the court on July 11 in the plaintiff's which was  
fourth section 100 of the law, to wit, "where which the action was  
brought. The instruction included this language of the section:  
'and for every person.' Defendant says that the plaintiff  
wishes to count in plaintiff's complaint and to be withdrawn and,  
ecologically, no exemplary damages are recoverable. It seems to  
other instruction was given defining as reference to exemplary damages  
and an instruction was given which clearly limited the damages  
damages to the proper amount. It is a matter that the defendant  
words in the instruction objected to, which increased the jury on  
that any probable instruction would involve the other instruction  
given on the question of damages. In *Hull v. Hull*, 211 Ill. 100, 1.  
cited by defendant, the jury obviously must have been misled by an  
erroneous instruction which indicated the basis for exemplary  
damages. That case and the instant case are not parallel. The  
verdict confirms our view that the instruction was not prejudicial.  
Because we believe the damages as assessed are not excessive.  
Plaintiff was stabbed in the left chest, right and left arm and the  
entired tissues of a great deal of blood before being taken on  
a stretcher to the County Hospital. Some of her wounds did not  
need stitching, but five of them required 27 stitches. She was in

the hospital a week, in bed at home a week and was treated by diathermy two or three times a week for a period of three weeks. It appears that while she was not working at the time of the incident, having shortly before been laid off, she was asked to return to work two months thereafter, but was unable to resume her work as a maid. She had worked for the same employer for about 5 years, earning about \$5.00 a week. At the time of the trial, which commenced more than two years after her injury, she was still unable to do the work to which she was accustomed. We think the damages were fairly assessed.

For the reasons herein given the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND REBEL, J. CONCUR.

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physician two or three times a week for a period of three weeks.

It appears that while she was not working at the time of the  
incident, having shortly before been laid off, she was asked to  
return to work two months thereafter, but was unable to resume her  
work as a maid. She had worked for the same employer for about  
3 years, earning about \$2.00 a week. At the time of the trial,  
which commenced more than two years after her injury, she was  
still unable to do the work to which she was accustomed. We  
think the damages were fairly assessed.

For the reasons herein given the judgment of the

Circuit Court is affirmed.

JULIUS ROSENTHAL

HUNTER, J. J. AND HENRI, J. HONORARY

41822

PETER B. ORLANDO,

Appellee,

v.

INTERSTATE MOTOR EQUIPMENT SYSTEM  
COMPANY, INC., a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

314 I.A. 673

MR. JUSTICE KILBY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for plaintiff in an action for damages to his automobile resulting from a collision with an automobile truck at the intersection of South Chicago avenue and 76th street, Chicago. South Chicago avenue extends northwest and southeast and 76th street extends east and west. The trial was by the court without a jury and the judgment was for \$184.47.

Plaintiff testified that about 12:30 A. M. on December 8, 1940, accompanied by two girls, he drove southeast in South Chicago avenue and stopped at 76th street to wait for the traffic signal lights to change; that south Chicago avenue is about 70 feet wide and contains street car tracks, and at 76th street which is about 30 feet wide, safety islands are placed between the car tracks and the curb at the northwest and southeast corners of the intersection; that when he stopped, his car was on the tracks east of the northwest safety island; that he planned to turn east in 76th street; that while stopped he saw the truck about 60 feet away being driven in a northwesterly direction in South Chicago avenue between the southeast safety island and the southeast curb; that he proceeded into the intersection when the lights changed to make the turn; that meanwhile the truck came onward, but he did not know how fast; that the truck was still coming toward him when, after permitting several cars preceding the truck to pass, he saw an "opening", and

Edward J. Jozak

3-21-4

(m)

PATENT &amp; TRADE MARK

Solely

V.

INTERNATIONAL TRADING COMPANY, INC., a corporation,  
Plaintiff,

vs.

314 I.A. 673

A. J. JONES, Defendant.

This is an appeal from a judgment for plaintiff in an action for damages to his automobile resulting from a collision with an automobile driven at the intersection of South Chicago Avenue and 70th Street, Chicago, Ill. Such Chicago Avenue extends northwest and southeast and 70th Street extends east and west. The trial was by the court without a jury and the judgment was for \$124.47.

Plaintiff testified that about 12:30 A. M. on December 6, 1940, accompanied by two girls, he drove southeast in South Chicago Avenue and stopped at 70th Street to wait for the traffic signal lights to change; that South Chicago Avenue is about 30 feet wide and contains street car tracks, and at 70th Street which is about 50 feet wide, safety islands are placed between the car tracks and the curb at the northwest and southeast corners of the intersection; that when he stopped, his car was on the tracks east of the northwest safety island; that he planned to turn east in 70th Street; that while stopped he saw the truck about 80 feet away being driven in a northeasterly direction in South Chicago Avenue between the southeast safety island and the southeast curb; that he proceeded into the intersection when the light changed to red in the turn; that meanwhile the truck came over, but he did not know how fast; that the truck was still coming toward him when, after permitting several cars preceding the truck to pass, he saw an "opening", and

XX made a left turn in front of the truck; and that when the front of his car was a foot east of the line of the southeast curb of South Chicago Avenue, its right rear was struck by the truck and damaged. He further testified that the pavements were slippery at the time of the accident.

One of the essential elements to be proved in the case was the agency between the driver of the truck and the defendant, its alleged owner. To impose on defendant the burden of showing that the driver was not its agent, plaintiff was required to make prima facie proof that the defendant owned the truck. Plaintiff's proof of ownership was meager and unsatisfactory. We shall not, however, dispose of this appeal on the question of agency.

At the time of the accident, Section 89 of Article IX, Chapter 95, Smith-Hurd Ill. Rev. Stats. was in force and it provides:

"Any driver of a vehicle approaching an intersection with the intent to make a left turn shall do so with caution and with due regard for traffic approaching from the opposite direction and shall not make such left turn until he can do so with safety."

Considering the time of the accident; type of intersection;  
plaintiff's view and knowledge of the oncoming truck and its  
position; and the slippery pavements and street car tracks, upon  
which plaintiff had to start and turn through an "opening", we  
believe that the plaintiff by failing to permit the truck to pass  
him, was guilty of contributory negligence. It follows, therefore,  
that the judgment xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx  
xxx cannot stand.

For the reasons herein given the judgment of the Municipal Court is hereby reversed.

JUDGMENT REVERSED.

FURKE, P.J. AND NEBEL, J. CONCUR.













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